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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 224.

THE PUBLIC CLEARING HOUSE,
Appellant.

vs.

F. E. COYNE, as Postmaster of the City of Chicago, in the State of Illinois,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN BEHALF OF APPELLANT.

D. T. SICALESTEEL,
COUNSEL FOR APPELLANT.

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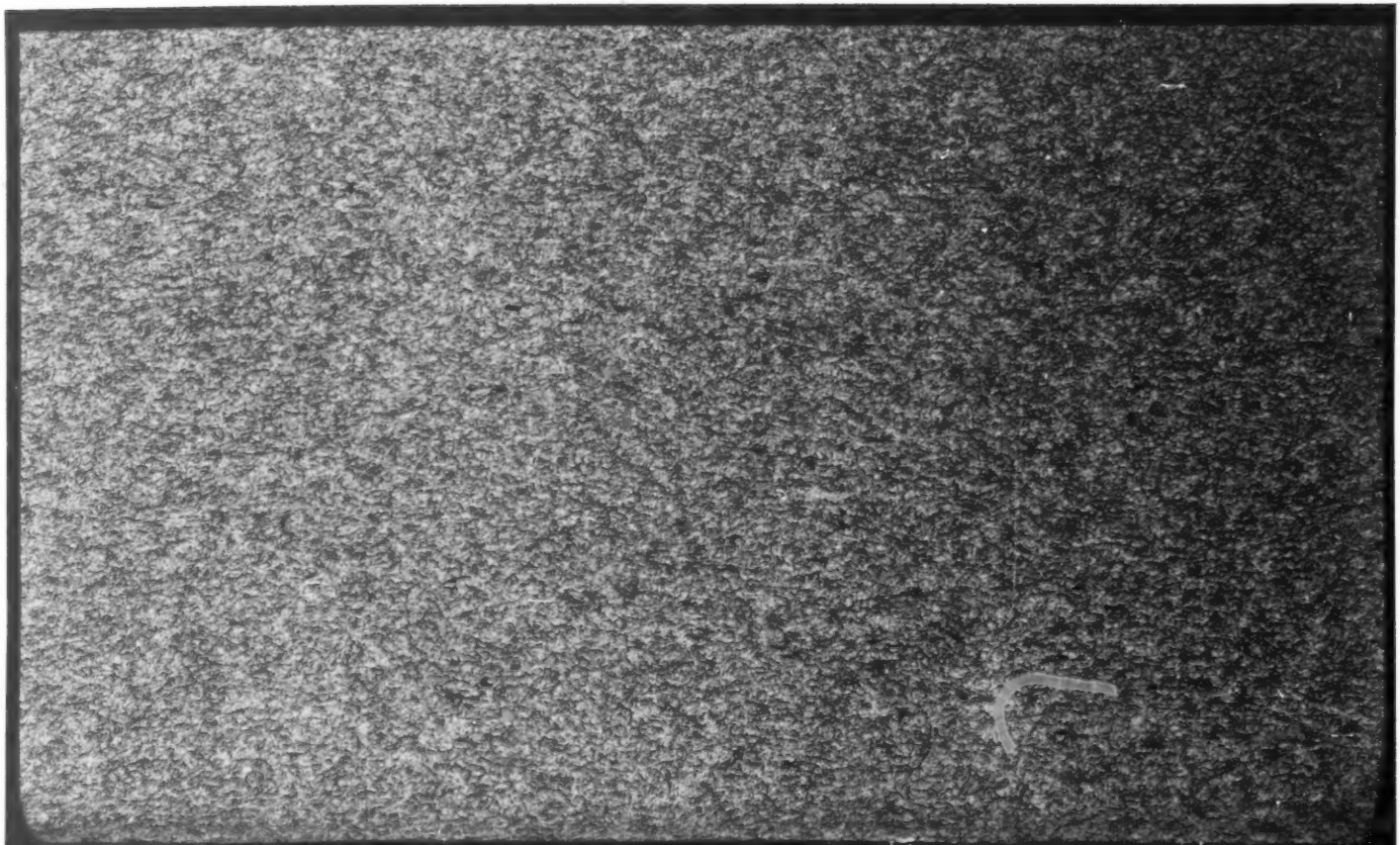

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THE PUBLIC CLEARING HOUSE, *Appellant,*

vs.

F. E. COYNE, as Postmaster of the City of Chicago, in the State of Illinois, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief in behalf of Appellant.

STATEMENT.

This is an appeal from an order and decree of the United States Circuit Court for the Northern District of Illinois overruling the appellant's exceptions to the master's report, confirming the report and dismissing appellant's bill for want of equity, at appellant's cost.

The bill was filed by appellant, a corporation organized under the laws of the State of Illinois, carrying on its business at the City of Chicago, in said district, against appellee, F. E. Coyne, in his official capacity as postmaster of said City of Chicago, praying for an injunction to restrain him from seizing and detaining appellant's mail, stamping it fraudulent, and returning it to the send-

ers thereof, and from denying to appellant the use of the money order and registered letter system of the United States post-office department. An answer and replication were filed, and the cause referred by the court to master in chancery William M. Booth, Esq., to take the evidence and report same, together with his conclusions thereon to the court.

The record presents for the consideration of this court the constitutionality of Sections 3929 and 4041 of the Revised Statutes of the United States as amended by Section 4 of the Act approved March 2, 1895, which permits the postmaster general of the United States and the post-office department to arbitrarily, without notice or hearing of any kind, and without any judicial determination, to order and forbid the use of the entire post-office establishment to whomsoever these officials shall see fit, and to brand, charge and publish any individual, firm or corporation with being engaged in business forbidden by the laws, and to deprive them without due process of law, or even the least semblance of process of law, of their property and property rights in the use of the United States mail service, and arbitrarily to order the interdiction and seizure of mail of any party they may see fit, even though such mail be innocent and properly mailable.

If the court should hold that said statutes are constitutional, then the record presents the further question if when an order has been issued against appellant forbidding it the use of the mails on the ground that "it is conducting a scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises" and the master and court finds that such was not the case, but, on the contrary, it was not so engaged, can the court still

deny the injunction prayed for, on the ground that the business of appellant is a lottery, and contravenes the lottery provision of said statutes?

If the court should hold that when a fraud order has been isued under said sections of the statute, on the ground that appellant was engaged in conducting a fraudulent business, and the court below finds that appellant was not so engaged, but that its business was in contravention of the lottery statute, then this record presents to the court the further question, of whether or not the facts as proven by the evidence constitute in law a lottery, within the meaning of the aforesaid statutes.

HISTORY OF THE PROCEEDINGS.

On the 24th day of November, A. D. 1902, at Chicago, in the State of Illinois, appellant (complainant) presented to the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States for the Northern District of Illinois its bill of complaint and application upon notice to defendant for an injunction against appellee, F. E. Coyne, as postmaster of the City of Chicago, which bill of complaint was duly verified. Thereupon Judge Kohlsaat entered a rule on the defendant to show cause in five days why a temporary injunction should not be issued as prayed for in the bill of complaint.

On the return of the rule, defendant filed his answer, and the court being otherwise engaged, referred the nearing on the return of the rule to master William M. Booth. The defendant offered oral testimony before the master in support of his answer and the master refused to hear any testimony on behalf of appellant (complainant) on the rule to show cause. The master recommended to the

court that the rule be discharged and the application for a temporary injunction be denied.

The master's first report to the court was not argued before the court, answer having been filed appellant at once (*i. e.*, December 8, 1902), filed its replication and moved the court for an order referring the cause to master in chancery William M. Booth, which was done (Rec., 101-102).

The parties and their counsel attended before said master on the 17th, 18th, 19th, 23rd, 28th and 30th days of December, A. D. 1902, and adduced certain oral and documentary evidence on behalf of the respective parties, which said documentary evidence, together with a full, true and correct transcript of the oral evidence, was filed by the master, together with his report in the office of the clerk of the court on January 6, 1903.

Before filing his said report the said master gave complainant's solicitor a copy of his said report, whereupon on the 5th day of January, 1903, the complainant, by its solicitor, filed twenty-six objections to said report with the master. The master sustained four of said objections and modified his draft report accordingly and overruled the other twenty-two objections filed with him, and he filed said objections with his said report (Rec., 108, 109, 110, 111). On January 9, 1903, the court below, on motion of appellant's (complainant's) solicitor, ordered that the objections taken before the master stand as exceptions before the court. (Rec., 158.)

On January 23, 1903, the court set the cause down for final hearing upon the master's report and appellant's (complainant's) exceptions to said report, and after argument overruled said exceptions, confirmed said report, and dismissed the bill of complaint for want of equity (Rec., 159).

On January 27, 1903, appellant (complainant) filed its petiton for appeal from the decree and order of court entered January 23, 1903, to this court and on same day filed its assignment of errors and appeal bond, whereupon the court ordered and adjudged that appellant (complainant) be allowed its appeal from said decree to this court (Rec., 160, 161).

In preparing the transcript of record for the appeal in this cause counsel for both parties abstracted the oral testimony taken before the master and eliminated all duplicate documentary evidence so as not to make the record cumbersome, and at the same time present to this court all the material evidence, both oral and documentary, which is essential or at all material to the determination of the question which the record in the court below or in this court presents for judicial determination.

The stipulation as to abstracting the testimony was entered into between Mr. Bethea, United States district attorney and the writer (Rec., 113).

The abstract of the testimony will be found in the record from pages 114 to 158; it, together with the stipulation, were filed in the office of the clerk of the Circuit Court for the Northern District of Iilinois, on February 19, 1903.

On February 20, 1903, the clerk of said court certified under his hand and seal of the court the transcript of record as per praecipe filed with him, which said transcript of record was filed in the office of the clerk of this court on the 24th day of February, A. D. 1903.

JudgeKohlsaat did not file a written opinion with the clerk of the court below.

ASSIGNMENT OF ERRORS.

First. The court erred in not adjudging that the statutes in question were unconstitutional and void.

Second. The court erred in overruling the complainant's exceptions to the report of William M. Booth, master in chancery, to the court.

Third. The court erred in ordering and adjudging that the report of said master in chancery to the court be confirmed.

Fourth. The court erred in refusing and denying to the complainant an injunction as prayed for in the bill of complaint.

Fifth. The court erred in dismissing the complainant's bill of complaint for want of equity. (Rec., 160.)

SPECIFICATION OF ERRORS.

The following are the exceptions to the report of the master in chancery, upon which appellant relies and will particularly urge before this court:

Exception Sixth. For that said master erred in the sixth paragraph of his report in finding, "then follows a table showing that if the league grows at the rate of fifteen to one, the total realization, etc., and also if the growth is at the rate of ten to one, he will receive $600, etc." The master should have found that then follows a table showing that if the league grows at the rate of fifteen to one (for five years) the total realization, etc., and if the rate of growth is ten to one (for five years) he will receive $600, etc., which was overruled by the court.

Exception Eighth. For that said master erred in finding in said section "that the said plan contains all the ele-

ments of a lottery; there is the small payments to be made, the chance of a large prize or winning in return; there is uncertainty as to what amount that prize will be, *and there is a certainty that there will be many blanks drawn.*" The said finding is contrary to the evidence and the weight of evidence and also because there is no evidence that there will be any blanks drawn whatsoever, which was overruled by the court.

Exception Tenth. For that said master erred in finding that "because the literature of the league does not promise any definite amount or ratio of profit to its members, it therefore emphasizes the lottery feature of the plan," which was overruled by the court.

Exception Eleventh. For that said master erred in finding in said seventh paragraph of his said report that the scheme is as utterly a gambling one, as utterly dependent upon chance, as the question whether a roulette ball will fall on the 'red' or 'black' or any specific number, and thus pay the gambler little or nothing, according to his luck. The mere fact that the personnel of the prize drawer is not left to chance does not appear to remove the lottery feature, which was overruled by the court.

Exception Twelfth. For that said master erred in finding in said seventh paragraph of his said report "that the only difference between this and the ordinary lottery is that in the ordinary lottery the amount of the prize is fixed in advance and the prize drawers are determined by lot, whereas in this plan, the prize drawers are determined in advance and the amounts of the prizes are settled by lot or chance. There appears to be no difference in principle;" which was overruled by the court.

Exception Fourteenth. For that said master erred in finding in the eighth paragraph of the said report that

there is a certainty that the end must come some time, and that when the end does come, substantially all who have joined and paid their money during the last four years of the existence of the league will lose absolutely all they have paid in, which was overruled by the court.

Exception Fifteenth. For that said master erred in finding in the ninth paragraph of his said report that the said plan or scheme may be characterized as *malum prohibitum,* which was overruled by the court.

Exception Sixteenth. For that said master erred in finding in the tenth paragraph of his said report that the recent case of *The American School of Magnetic Healing* v. *McAnnulty,* did not overrule the decisions of the courts in prior cases, but that it merely decided that in that case the postmaster general acted outside of his authority under those statutes, which was overruled by the court.

Exception Seventeenth. For that said master erred in all of his findings contained in the thirteenth paragraph of his said report, which was overruled by the court.

Exception Eighteenth. For that said master erred in finding that there was no decision of the courts holding that where the postmaster general has acted under the statutes referred to in the matter clearly within the scope of those statutes, the court may interfere with his action, but many to the contrary effect, which was overruled by the court.

Exception Nineteenth. For that said master erred in finding in the fourteenth parargraph of his said report that the issuing of the fraud order in question was fully justified by the facts, which was overruled by the court.

Exception Twentieth. For that said master erred in finding and recommending that the injunction prayed for in the bill be denied, which was overruled by the court.

Exception Twenty-fourth. For that said master erred in finding that the plan and system of co-operation as applied by the League of Equity, clearing through the complainant, The Public Clearing House, is a lottery and has all the elements of a lottery because said evidence and the findings of the said master show that said plan and system do not contain any of the elements of a lottery, and is not in fact or in law a lottery in any legal sense of that term, nor does it contain any elements of chance set forth in the statutes referred to in the bill of complaint, which was overruled by the court.

Exception Twenty-fifth. For that said master erred in not finding that the statutes set out in the bill of complaint are unconstitutional and void, which was overruled by the court.

Exception Twenty-sixth. For that said master erred in excluding evidence offered by the complainant tending to prove that G. A. F. Christiancy, acting assistant attorney general for the post-office department, had stated "that there is not any element of lottery or chance in complainant's plan," which was overruled by the court.

The appellant does not waive any of the exceptions not above specified, which were overruled by the court below, but does not think they should be argued in this court as they do not go to the merits of the questions to be decided in this court.

The Facts as Alleged in the Bill and Proven on the Trial.

The facts in this case are those alleged in the bill of complaint, which were either proven by oral testimony or admitted by the answer of appellee, and are as follows:

The appellant is an Illinois corporation conducting its business at 184 La Salle street, in the City of Chicago, Illinois; that the objects and purposes for which it was incorporated as provided by its articles of incorporation, "Is to do a general brokerage and commission business, to collect and disburse money, to conduct an exchange and information bureau for patrons, and to act as agent for the aforesaid objects and purposes."

That it had proceeded with the conduct of its said business and had, prior to November 13, 1902, been receiving in the ordinary course of the mail a large number of sealed letters, registered letters, packages and packets and general mail matter addressed to it by its correspondents and patrons and also by the members of a *purely mutual society* known by the name of "The League of Equity," and that all the aforesaid mail matter had been, prior to said date, promptly and with dispatch delivered to appellant at its said office by appellee, or his assistants, as postmaster of said City of Chicago, who was duly qualified and acting postmaster of the United States post-office at said City of Chicago, and that as such postmaster he had during all said time under the postal laws and postal regulations of the United States full control of and supervision over the receipt and delivery of all mail matter at said City of Chicago.

That it was the duty of appellee as such postmaster to deliver to appellant all mail matter addressed to appellant and received at said post-office by appellee, and it was

alleged that appellee wholly in disregard of his official duty and in violation thereof and of the rights of appellant refused to deliver to it any such mail matter, but arbitrarily, wrongfully and without notice to appellant, either before or after the seizure and detention of said mail matter as it was received from day to day, wholly refused and still refuses to deliver said mail matter to appellant or its agents.

It was further alleged and proven that said mail matter so seized and detained by appellee contained post-office money orders, express companies' money orders, bank drafts and currency, which was being remitted to appellant by its patrons and by the various members of the League of Equity, and which said patrons and members of the League of Equity were and still are desirous of having delivered by appellee to appellant, and that by such interference appellant would be irreparably injured and absolutely ruined in its business by reason of being wholly deprived of its right to the use of the post-office establishment of the United States for any purpose whatever since the 13th day of November, A. D. 1902.

It was further alleged and proven that C. Franklin Davis and Martin J. Baxman, copartners as the board of managers of the League of Educators had been for more than three years then last past engaged in a similar business of acting as clearing house for a purely mutual voluntary society known as the League of Educators, with the same basic principle as underlies the operation and system of co-operation by the League of Equity, and that as such clearing house they had accumulated a large number of mail list cards, people's addresses, records, books and papers which were of great value to appellant in the conduct of its business and which it purchased from said

Davis and Baxman for use in its business of acting as fiscal agent and clearing house for said society known as the League of Equity.

It was then alleged in the bill of complaint and proven beyond all controversy that "Said persons are organized as a purely mutual, voluntary, co-operative society known as the League of Equity, and who were and are appointing your orator their fiscal agent and clearing house to act for them on their behalf during the period of co-operation of said co-operators who were and are co-operating with one another in a purely mutual way in strict accordance with the terms and conditions of the application for the co-operator's agreement and the agreement itself, a copy of which application was and is as follows:

Application for Co-operator's Agreement in the League of Equity Formed for Mutual Benefit of True Co-operators.

I herewith enclose three dollars ($3) and apply for the co-operator's agreement in the League of Equity.

1. My full name is .....

(Be sure and prefix your name with Mrs. or Miss as the case may be.)

2. My age is ..... yrs.

3. My permanent address where notices are to be sent is St. and No. .....
Town .....,
County ....., State .....

DECLARATION.

I warrant the above statement to be true and complete, and I agree to co-operate faithfully according to the terms of the co-operator's agreement, and hereby authorize and empower the public clearing house to act as my agent in this behalf.

Signature of applicant .....
Dated at ..... this ..... day of
....., 190..
Recommended by .....
Recommender's No. ..... Address .....

Address all communications to The Public Clearing House (Incorporated), 184 La Salle Street, Chicago, Ill., C. Franklin Davis, Pres., Martin J. Baxman, Secy. and Treas."

A copy of which said co-operator's agreement was and is as follows:

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

It was further alleged and proven that the co-operators of the League of Equity had been and still were co-operating with one another strictly in accordance with the terms of the aforesaid application and agreement and not otherwise.

The manner in which this society known as the League of Equity operated and carried on its system of purely mutual co-operation was that each of the members when he or she joined the society, each promised the other members that he or she would fully comply with the terms of the aforesaid agreement, and that in order to do so had appointed appellant their fiscal agent and clearing house to act for them, keep their records, issue literature and notifications to members, receive their monthly dues, and to pay same out each month *pro rata* among the members for whom the dues had been paid in, and generally to conduct their office business for them, retaining for its services ten per cent. of the amount collected, and also receiving $3 as enrollment fee.

The plan and system of co-operation as shown beyond all controversy on the hearing, and as found by the court below, shows that people were not induced to join by reason of any false or fraudulent pretenses, representations and promises made to them by appellant or its officers or agents, but that full opportunity was given to them to become fully conversant with the details and workings of the league's system. (Rec., top p. 107.)

The plan and system of co-operation is simply a self-adjusting, co-operative system which is controlled entirely and solely by the "will" of the co-operators, all depending upon their carrying out the terms of their agreement to co-operate with one another, using their energies to obtain new co-operators and pay their monthly stipulated

sum of $1 for the benefit of their fellow-being who had been or still is a member and who had fully complied with all the terms of said agreement. In other words, it is a purely mutual, voluntary society of people throughout the country who have joined hands for the purpose of helping one another, and who render all the co-operative work or service in securing new co-operators, and who are to realize in accordance with the terms of the ordinary causation table, set forth in the said agreement. The system being controlled by the "wills" of the co-operators, the amount of their realization or gain will be whatever they make it themselves by reason of their work or service in securing new co-operators as is shown in the ordinary causation and realization table, set forth in the agreement. Their period of co-operation is five years, but those desiring to receive part of their realization in one year may do so by securing new co-operators (Agreement, Sec. 4, Rec., 96), or, in other words, it is simply a purely mutual, voluntary society of people throughout the United States and Canada who have joined together for the purpose of helping one another in this life; and the members of this society have each promised the other that they would faithfully and honestly comply with all the terms of the co-operator's agreement above set forth. The system itself is simply an automatic, self-adjusting, co-operative one which is controlled entirely and solely by all the members, all depending upon each other to fulfill the terms of the aforesaid agreement, all working and using their best endeavors to honestly induce others to join with them in order that their realization may be as large as possible.

As will be seen by the terms of the aforesaid agreement, each member joining pays an enrollment fee of $3, and agrees to pay the sum of $1 each month for sixty months or five years, which said $1 so paid is for the benefit of

some of their fellow co-operators who have been or still are members a sufficient length of time and have complied with the terms of said agreement

The $1 so paid in each month is paid to appellant as the fiscal agent and clearing house for all the members. Its duty is to receive same and keep an accurate account of each individual co-operator's payments and the work and service he or she has performed, and after each month's payments are at its office to divide once each month the total amount received equally among the members for whom it was paid, retaining ten per cent. for its services, office rent, clerk hire, etc.

The appellant published monthly a magazine, called the "Vigilant," and the names of the members who were to realize that month were published therein so that each co-operator, when paying his or her $1 that month, knew precisely for whom it was paid (as will be seen on pages 82 and 83 of record).

The difference between the amount paid by a member and the amount realized by him at the end of his period of co-operation is the ratio of growth, which growth is produced by the service and work of all in securing new members, as is shown by the Ordinary Causation Table, and is fully explained by the witnesses Davis, Runck, Walter and Higgins. (Rec., 114-136 and 157.)

The system being absolutely controlled by the members, the amount of their realization or the gain, if any, will be whatever they make it themselves by reason of their work in securing new co-operators

There is not a promise of any kind made by appellant as to what a member will realize. The only promise made by appellant is that it will accurately do the clerical work for the members, receive and honestly disburse to the

realizing members the money paid in each month, and do all in its power to help increase the membership.

It was further shown that in order to successfully carry on its business of acting as fiscal agent and clearing house for the co-operators of the League of Equity and to transact its other business, it was absolutely necessary for appellant to have the uninterrupted use of the United States mails, and that it had been wholly denied and deprived of its rights and privileges of using the United States mails or post-office at Chicago, Illinois, for any purpose whatever since the 13th day of November, 1902, and that thereby it was greatly damaged and injured and its business ruined unless the action of the postmaster at Chicago was enjoined by order and injunction of the court.

It was further alleged and proved that appellee in his official capacity as such postmaster, based his action for interference and denial to the appellant of the ordinary postal facilities and in barring it from the mails since the 13th day of November, 1902, upon an order issued under and by virtue of Sections 3929 and 4041 Revised Statutes of the United States as amended, which order was in words and figures following, to wit:

"ORDER NO. 1267.

POST OFFICE DEPARTMENT.

WASHINGTON, D. C., Nov. 10, 1902.

It having been made to appear upon presentation to the Postmaster General, upon evidence satisfactory to him that the League of Equity and the Public Clearing House and their officers and agents in their capacity as such, at Chicago, Illinois, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations or promises in violation of an Act of Congress entitled: 'An act

to amend certain sections of the Revised Statutes relating to lotteries and for other purposes,' approved September 19, 1890.

Now, therefore, by authority vested in him by said act, and by the Act of Congress, entitled: 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States,' approved March 2, 1895. The Postmaster General, hereby forbids you to pay any postal money order drawn to the order of said concerns, or to the officers or agents as such, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon presentation of a duplicate money order applied for and obtained under the regulations of the department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to such concerns or to their officers or agents as such, to postmasters at the office at which they were originally mailed to be delivered to the sender thereof, with the word 'fraudulent,' plainly written or stamped upon the outside of such letters or matter, provided, however, *then* where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed in that case to send such letters or matter at your office with the word 'fraudulent,' plainly written or stamped thereon, and disposed of as other dead matter under the laws and regulations applicable thereto.

(Signed) H. C. PAYNE,
Postmaster General.

To the postmaster, Chicago, Illinois."

And that said appellee gave as his sole and only excuse for interfering with the appellant's mail was by reason of his receipt on the 13th day of November, 1902, of the aforesaid order, and that he stated he would continue to deny to appellant the use of the post-office facilities

and obey the said order until it was revoked by the Postmaster General.

It was further alleged in the bill of complaint that appellant was not in any manner in the conduct of its business and in receiving mail and the use of the United States Post-Office aforesaid in any manner whatsoever violating said Sections 3929 and 4041 Revised Statutes, passed September 19, 1890, and Section 4 of an Act approved March 2, 1895, which said statutes are as follows:

> "Section 3929 of the Statutes of 1890, Chapter 908, Section 2:
>
> The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift, enterprise, or scheme, for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmaster at any post-office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation or association of any kind to return all such registered letters to the postmaster at the office at which they were originally mailed with the word 'fraudulent,' plainly written or stamped upon the outside thereof, and all such letters so returned to such postmaster shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift, enterprise, scheme or device that remittance for same may be made by

registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be *prima facie* evidence of the existence of such agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself."

"Section 4041 of the Statutes of 1890, Chapter 908, Section 2:

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift, enterprise, or scheme, for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbids the payment by any postmaster to the said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders, but this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift, enterprise, scheme or device, that the remittance for the same may be made by means of postal money orders to any other person, firm, bank, corporation or association named therein, shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of any such agency in any other legal way."

"Section 4. That the powers conferred on the Postmaster General by the Statutes of 1890, Chapter 908, Section 2, are hereby extended and made applicable to all letters or other matter sent by mail.

Approved, March 2, 1895."

Appellant alleged in its bill of complaint that it was not engaged in any lottery, so-called gift, concert or similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false or fraudulent pretenses, representations or promises of any kind, and had not in any manner or form violated any of the Postal Laws or Postal Regulations of the United States; and further alleged and proved that all such mail matter coming into the possession of appellee as postmaster were properly stamped and in all things complied with the Postal Laws and Regulations, and were mailable matter under said Laws and Regulations, and did not in any mannner pertain to anything prohibited by said statutes.

It was further alleged and proven that said mail matter contained checks, drafts, money and money orders of the United States, payable to it or its officers or agents as such for the express purpose of acting as fiscal agent and clearing house for the co-operators in the League of Equity.

It was further alleged and proven that on November 13, A. D. 1902, about five thousand persons throughout the United States and Canada signed the aforesaid application for membership and had appointed appellant the fiscal agent and clearing house to act for them in the manner above set forth, and that the said mail had also contained letters ordering merchandise which had been advertised by it for sale as broker and commission agent, and also contained mail matter concerning exchange of merchandise and chattels through its medium.

It was also alleged and proven at the trial that the aforesaid order was issued by the postmaster general against it without any hearing by or on its behalf, and

without any investigation of any kind by the post-office department relative to the business conducted by it; and it is charged and alleged upon information and belief that the order was issued by said postmaster general without any evidence being placed before him for his consideration relative to its business, and that the said order was issued absolutely upon the recommendation of one, G. A. F. Christiancy, who claimed to be acting assistant attorney general for the post-office department (and who has since been compelled by reason of the post-office investigation to resign his position.)

It was further alleged that the said Christiancy had said that there was not any element of lottery or chance in the plan and system of co-operation, and that appellant's officers and agents had not been guilty of any fraud or fraudulent practice, but that he would hold the plan and system of co-operation was a fraud upon its face and would not finance out, and, therefore, he would cause a fraud order to be issued by the postmaster general. Evidence to prove this allegation was offered at the hearing before the master, but was not admitted, to which ruling appellant assigns error.

Appellant alleged and still claims that the aforesaid sections of the United States Statute are in violation of the 4th, 5th and 14th Amendments of the Constitution of the United States, and that they undertake to deprive persons of property, and if enforced do deprive persons of property and property rights without due process of law, and attempts to place in the power of the postmasters of the United States and of the post-office department the sole and exclusive right to pass upon appellant's rights as between itself and other parties with whom it deals and transacts business through the mails, without a hearing; and that the said statutes are void for the

reason that they provide for no tribunal, court or authority to hear and determine any violation of the statutes or any claimed violation of the statutes, but place the same absolutely in the power and control of postmasters and the post-office department, and they attempt to vest an arbitrary discretion in the postmasters and post-office department to determine for themselves as they see fit, whether right or wrong, the question as to who shall and who shall not have and receive mail matter from the United States post-office department, and vests in them the power, if enforced, to interdict and absolutely prohibit the carrying on of all commercial and business transactions of the country done through the mailing systems, if they see fit to do so, and makes the postmasters and post-office department the sole judges in their own case.

It was conclusively proven on the trial that the statements made in the literature issued by appellant and its predecessors to the effect that the books of account and all vouchers were open for inspection by the members or co-operators at any time were true, and when the post-office inspectors appeared at the office of the board of managers of the League of Educators in September, 1902, they were afforded every facility to make a thorough examination, and every book, document, paper, check book or voucher asked for by these inspectors was delivered to them, and when they left the office they stated to the board of managers that they had afforded them every facility in making the examination. (Rec., 117, 118.)

The bill prayed for process and for writ of injunction against appellee in his official capacity as postmaster of Chicago, Illinois, enjoining and prohibiting him from

carrying out the terms of said fraud order and from interfering or tampering with appellant's mail, except to deliver it in the ordinary course of delivery; and also prays for all other and proper relief which to the court may seem meet and proper, and which equity shall require to the end that complete justice may be done.

POINTS IN BRIEF.

I.

The appellant challenges the constitutionality of the statutes above set forth, which authorize the postmaster general "upon evidence satisfactory to him," and which do not provide for any trial, hearing or inquiry of any kind, to arbitrarily seize the honest mail of any citizen of the United States as alleged in the bill, and to interdict and prohibit its receiving any mail, to destroy its business, and its property and property rights, and to subject its papers and sealed packets to unreasonable searches and seizures.

4th Amendment to Constitution.

5th Amendment to Constitution.

14th Amendment to Constitution.

Sec. 8 of Article 1 of the Constitution.

Chicago, M. & St. P. Ry. Co. v. *Minnesota,* 134 U. S., 418.

Boyd v. *United States,* 116 U. S., 616.

Murray's Lessees, 18 Howard, 276.

In re Zeibold, 19 Rep., U. S. C., 746.

Palairets Appeal, 67 Pa., 49.

Hoover v. *McChesney,* 81 Fed. Rep., 472.

Fairfield Floral Co. v. *Bradbury,* 87 Fed. Rep., 411.

United States v. *Rider,* 50 Fed. Rep., 406.

United States v. *Keokuk & H. B. Co.,* 45 Fed. Rep., 178.

(And the recent case) *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S., p. 94.

II.

I make the point that because the master and the court confirming his report have found that appellant, its officers and agents "have not been guilty of making false or fraudulent misrepresentations in order to induce persons to become members of the league, but that full opportunity has been given for all persons to become fully conversant with the details and workings of the league's system." Rec., 107.

And the order denying appellant the use of the post-office establishment, reciting:

> "That the postmaster general, upon evidence satisfactory to him that the League of Equity and the Public Clearing House, and their officers and agents in their capacity as such, at Chicago, Illinois, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations or promises, etc."

And said order having been issued against appellant, forbidding it the use of the mails on the ground of fraud, not having been sustained by the evidence, that the court should have granted to appellant the injunction prayed for, for the reason that the postmaster general in issuing the "fraud order" has acted outside of his authority under these statutes.

> *American School of Magnetic Healing* v. *McAnnulty,* Vol. 187, pp. 94-111, U. S. Supreme Ct. Rep.

III.

I make the point that even if these statutes are constitutional, yet the appellant corporation, from the facts as proven at the trial and found by the court, is not as a matter of law, engaged "in conducting any lottery, gift enterprise or scheme for the distribution of money or of any real or personal property, by lot, chance or drawing of any kind" within the meaning of said statutes, and the postmaster general having assumed and exercised jurisdiction in a case not covered by said statutes, and having acted outside of the scope of the said statutes, the injunction prayed for should have been granted in any event.

Master's findings confirmed by the court, being paragraph 6 and that part of paragraph 7 down to "paid in by members," Rec., pp. 104-105.

Bouvier Law Dict.

Webster's Dict.

U. S. v. *Olney,* 1 Abb. (U. S.), 278; Deady (U. S.), 461.

Horner v. *U. S.,* 147 U. S., 458.

U. S. v. *Politzer,* 59 Fed. Rep., 276.

People v. *Elliott,* 74 Mich., 264; 16 Am. St. Rep., 640.

Ex parte Kameta, 36 Oregon, 251.

Meyer v. *State,* 112 Ga., 20.

State v. *Kansas Merc. Assn.,* 45 Kan., 231; 23 Am. St. Rep., 727.

State v. *Boneil,* 42 La. Ann., 1112; 21 Am. St. Rep., 413.

Barclay v. *Pearson* (1893), 2 Chy., 154.

Taylor v. *Smeaton,* 11 Q. B. D., 210.

State v. *Clark*, N. H., 335; 66 Am. Dec., 723. Quoted with approval in:

McDonald v. *U. S.*, 63 Fed. Rep., 426, affirming same case in 59 Fed. Rep., 565.

Lynch v. *Rosenthal*, 144 Ind., 90.

U. S. v. *Wallis*, 58 Fed. Rep., 942.

U. S. v. *Fulkerson*, 74 Fed. Rep., 627.

State v. *Interstate Investment Co.*, 60 N. E. Rep., 220.

Am. & Eng. Enc. of Law, Vol. 14, p. 600, 2nd Ed.

Dunn v. *People*, 40 Ill., 465.

Thomas v. *People*, 59 Ill., 160.

Elder v. *Chapman*, 176 Ill., 142, p. 150, overruling *Elder* v. *Chapman*, 70 Ill. App., 293.

Wilkinson v. *Gill*, 74 N. Y., 67; 30 Am. Rep., 264.

Attorney General's Opinions, Vol. 23, p. 263.

IV.

I make the further point that the appellee not having excepted to any of the findings of the master and the court, that the report of the said master, as confirmed by the court, is absolutely binding upon him and precludes appellee from now raising the question in this court as to the correctness of the finding of the postmaster general, set forth in the fraud order complained of.

V.

I make the further point that outside of the question of the constitutionality of the statutes challenged in this record, that on the merits there is only one question for the court to determine, and that is, whether or not, from the facts proven, was appellant, as a matter of law, engaged in conducting "a lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property, by lot, chance or drawing of any kind" within the meaning of said statutes?

ARGUMENT.

The court below not having filed a written opinion in this case, nor did he at the close of the argument orally express any opinion in regard to the constitutionality of the statutes, further than to state that in his opinion they were constitutional; therefore, we shall in this argument have to look to the four corners of the master's report, which was confirmed by the court, for the reasons which governed the court in denying appellant the relief prayed for in its bill of complaint.

In preparing the bill of complaint we endeavored to fully and correctly state to the court all of the material facts which were necessary to a decision of the questions at issue in this record. The voluminous record in this cause is by reason of the defendant, when filing its answer to the bill, attached to the answer all of the literature, pamphlets, circulars and certificates which the predecessors of appellant had at any time ever issued.

In our opinion the entire questions at issue in this record could have been disposed of by a demurrer to the bill of complaint, for the reason that the question of the constitutionality of the statutes involved in this record were fully challenged in the bill; the merits of the case, that is, whether or not appellant was guilty of fraud or was carrying on a lottery, could be equally disposed of from the application and co-operator's agreement, which was also set forth in *haec verba* in the bill.

While appellant objected to the introduction of all of the literature attached to the defendant's answer, it did not strenuously insist upon its objection, for the reason

that, as it had nothing to conceal, it was willing that the whole matter should come before the court. In a further effort to save incumbering the record, the testimony which was very voluminous, taken before the master, was abstracted, and Mr. Bethea, United States district attorney, counsel for the defendant, consented and stipulated that the abstract of testimony which was filed with the clerk of the Circuit Court should be used in this appeal. Stipulation will be found in the record, page 113. With this explanation to the court, I will now proceed to argue the questions raised on this record as presented to this court on final disposition.

THE APPELLANT INSISTS THAT THE ABOVE STATUTES ARE UNCONSTITUTIONAL AND VOID, BECAUSE THEY VIOLATE THE 4TH AND 5TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, READING AS FOLLOWS:

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

The master in his report claims that these statutes have been held constitutional by the courts, but I respectfully submit that in no well considered case have the courts held that these statutes are constitutional even inferentially.

The case which appellee relies upon as being decisive of this point is the case of the *Association* v. *Zumstein*, 67 Fed. Rep., p. 1000, which was a decision by the Circuit Court of Appeals for the Sixth Circuit, Judge Lurton delivering the opinion of the court. At the time that the decision of that case was rendered the statutes in question only related to registered letters and to payment of post-office money orders and did not cover or pretend to cover all mail matter as they do now by the Amendment of March 2, 1895.

In that case the court decided that the registered letter and money order system were privileges which could be granted or withheld at pleasure and that they were not a right, as was the case with all other mail matter. The constitutionality of those statutes was not raised or

argued in that case. The question argued before the court by appellant was whether or not the scheme or plan was within the inhibition of the statutes and the decision of the court was that the postmaster general, having passed on it and condemned it, the courts were powerless to review his decision. This also was the decision of Judge Thayer in the case of *American School of Magnetic Healing* v. *McAnnulty*, 102 Fed. Rep., 565, and he based his decision on the Zumstein case. But that case does not in any manner whatever pass upon the constitutionality of these statutes. The point that it did decide was overruled in the Supreme Court in the McAnnulty case on November 17, 1902, *supra*, viz.: That the postmaster general's action under those statutes is reviewable by the court, and the court reversed his decision and granted the appellants the injunction against the postmaster, as prayed. I contend and insist that the use of the mails is a right and not a privilege, and in the language of the Supreme Court in the McAnnulty case,

> "there letters contained, checks, drafts, money orders and money itself, all of which were their property as soon as they were deposited in the various post-offices for transmission by mail."

It seems to the writer to be almost elementary that the letters and packages deposited in the mails at once become the property of the addressee, and to seize and detain those letters or return them to the addressor or to the Dead Letter Office, to be treated as other dead matter, is to deprive the appellant of his property therein. But in any event whether a letter deposited in the mails is the property of the addressee or addressor, its seizure by the postmaster is in violation of the fourth amendment to the constitution against unreasonable search and seizure.

These statutes, if constitutional, place in the hands of an executive officer the absolute right to arbitrarily, without trial or legal evidence or any hearing of any kind by the party accused, prohibit him the use of the mail, no matter how innocent or moral may be the business, or how commendable may be his objects. A citizen may be thus deprived of an important right and his business destroyed, and this destruction of property and business of a citizen is begun and completed by a petty official in the post-office department; he privately hears the accusation, secretly examines the business advertisements and formulas of the individual or concern, and, without notice to the accused, with no opportunity to be heard, the individual or concern is condemned and sentenced to be deprived of his right to the mails, his business destroyed and his reputation defamed, and he is branded by the postmaster, on instructions from this official, as a fraud and a criminal, and all letters and communications sent to him by his friends, his relatives and business associates are stamped "business of addressee has been declared Fraudulent by order of Post-office Department," and his letters, thus stamped, are returned to the senders thereof, if known, and if not, they are sent to the Dead Letter Office, to be treated the same as other dead matter.

It will be said by the appellee that this power is not arbitrarily exercised by the department in this manner, and, although the officials of that department may have that power, it is never arbitrarily used. This is not so. The evidence in this case shows that it was exercised in that arbitrary and unlawful manner; the appellant was adjudged by the postmaster general, or rather by G. A. F. Christiancy, the acting assistant attorney general for the post-office department, to be guilty of obtaining

through the mails money or property by means of *false and fraudulent pretenses,* representations and promises. Yet the master and the court have found in this case, after a full hearing, that the appellant was not guilty of the charges adjudged against it by the postmaster general, or, more correctly speaking, said acting assistant attorney general.

Further than that, the *personal mail* of the writer, whose only interest in the appellant's business is that which an attorney has for his client's welfare, had been seized by the appellee, and he has been absolutely deprived of his right to the use of the mails, and all letters addressed to him had been seized and stamped fraudulent and his business through the mails has been destroyed and even his personal mail of his relatives and friends, addressed to him at his home, have been treated in the same unlawful and arbitrary manner, and the same fate has befallen the mail of both Mr. Davis and Mr. Baxman; even the mail addressed to them at their homes has been similarly treated, and this notwithstanding the fact that nowhere in any of the letters or literature does a single line appear requesting any of the appellant's patrons to send mail to them at their residences, nor do any of the patrons know their house addresses. The writer and his clients have been secretly accused and condemned and have been branded as criminals by the defendant, acting on the instructions of said official, and this was done without any kind of a notice or hearing, and we had no knowledge that we had been secretly accused and condemned until we learned that the sentence was being executed.

Never before in the history of this country have any such outrageous practices ever been committed by any person or official of the government under the pretense

of law and order, and by persons sworn to uphold the constitution and laws of this country. Even these statutes do not authorize any such unwarranted and unlawful actions. The statute makes the *quality of the mail matter deposited in the mail,* and not the *name* and *business* of the citizen, the test of whether that *matter is mailable.* And to condemn the citizen without notice, warning or hearing and without having first legally determined that he has committed an offense, is contrary to the spirit of our laws.

Whether a citizen has violated the law and incurred and must suffer the penalty attached, involving the forfeiture of a right and loss of property and reputation, which, but for the violation of that law, he might have continued to enjoy, is a *judicial,* and not a *legislative* or *administrative,* question.

Where the deprivation of a right as a penalty for an offense carries with it the confiscation or destruction of property and property rights, and such deprivation of right or privilege is inflicted as a penalty for a violation of law, the question whether the law has been violated and whether the citizen has incurred the penalty is a question for the *courts,* and not one that can be *legally determined* and the penalty inflicted by an administrative officer without notice and without a hearing.

Rights which belong to the citizen and property owned by him can be *taken away legally* only by "due process of law," and due process of law involves *notice* to the *accused* and an impartial *hearing* by a judicial tribunal established by the law of the land.

Murrays Lessees, 18 Howard, 276.
Taylor v. *Porter,* 4th Hill (N. Y.) Rept., 145.
Palairets Appeal, 67 Pa., 49.

The right to use the mails is one which belongs equally to every citizen.

The master found, and it is undenied, that the business of this company cannot be conducted without the use of the mails; nor is its business exceptional in that regard. Very few businesses can be successfully carried on in this age if deprived of the use of the mails. The *mails* and *business* are inseparably interwoven, bound up and blended; withhold the mails and business is destroyed. Upon the right to use the mails business and property interests depend. It is a truism that to destroy the usual and ordinary means necessary to conduct a business is in effect to destroy that business, and *business is property.* The rights and property of the citizen cannot *legally* be taken away or destroyed, or the enjoyment thereof abridged, without "due process of law," which means, "A law which hears before it condemns, proceeds upon inquiry and renders judgment only on trial."

The acts here complained of take away not a mere privilege, but destroys a *right,* and with it deprives the citizen of his property, without "due process of law."

The fraud order is said to be issued in the discretion of the postmaster general, *but it is in fact* issued by the acting assistant attorney general for the post-office department whenever he is satisfied that any citizen, company or concern is in any manner violating the provisions of the statutes herein set forth as *construed* by that official.

These acts have been declared unconstitutional by the courts in each case in which they have been challenged, and Judge Barr of the United States Circuit Court of Kentucky, in an elaborate and well reasoned decision, has

so declared them; so has Judge Putnam of the United States Circuit Court of Maine.

In the case of *Hoover* v. *McChesney*, 81 Fed. Rep., 472, Judge Barr said:

> "While the Supreme Court has thus indicated the general power of congress to determine what matter shall be excluded, it has not yet, we think, decided that congress has the power to delegate to any executive officer the power to determine the person or persons who shall be excluded from the right of sending or receiving mail by the postal service. If we understand the trend of the decision, it has not yet been decided that either congress or an executive officer has the right under this power to exclude any particular person or any class of persons, citizens of the United States, from the benefits arising from the use of the postal service of the United States."

Further in the opinion he says:

> "If we are correct in concluding that the use of the postal service of the United States by a citizen thereof is a right in the nature of a property right, then it must follow that the order of the 17th of February, 1896, of the postmaster general (fraud order), which finds complainant guilty of a violation of the postal laws and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned during his pleasure, is not due process of law within the constitutional meaning. In this connection we think that the fourth amendment to the constitution is also applicable, which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure shall not be violated, etc."

And further:

> "Whether we regard these letters, which were sent through the mail properly addressed and in the hands of the defendant as belonging to the sender or to the complainant to whom they were sent, they

should be and are constitutionally equally exempt from seizure except under the provisions of the constitution. When, therefore, sealed letters and packages were seized by the defendant under the order of February 17, 1896, without warrant and marked "fraudulent" and returned to the dead letter office, to be there disposed of as other dead matter under the laws and regulations, we submit that this provision of the constitution has been violated."

And again the learned judge says:

"We fully recognize that the court in taking jurisdiction is not asked whether to compel by mandatory injunction or by restraining order the performance of a ministerial duty. We fully recognize the settled doctrine, as announced in the case of *Gaines* v. *Thompson*, 7th Wall., 347, and the various other cases therein reviewed, and since that time, as well as the authority of the case of *Enterprise Sav. Ass'n* v. *Zumstein*, 15 CC., 153, 67th Fed., 1000. But we, however, submit that, if correct in our view, *congress had no constitutional rights to give to the postmaster general the authority thus to prohibit to a citizen of the United States without notice and without trial the use of the postal service of the United States at his pleasure because he became satisfied that that citizen had been or was engaged in conducting a lottery or similar enterprise.*"

As was said by counsel for appellant in his brief in the McAnnulty case before this court:

"This case, in our judgment, is the most exhaustive one on the subject, and reviews and harmonizes with every other case affecting this question, and holds that these sections of the statute which give the postmaster general or any other postmaster the right to arbitrarily hold up, interdict and prohibit without notice, hearing or opportunity for hearing, the delivery of proper and honest mail to any citizen of the United States, violates both the fourth and fifth amendments of the Constitution of the United States. The fourth amendment, because of the fact that it permits the absolute seizure and taking away

of the mail of the citizen and of his property right thereto, without warrant, without trial, without hearing, upon the motion of the postmaster general, arbitrarily and of his own volition. And that it violates the fifth amendment of the constitution, because it is taking the property and property right of the citizen without due process of law, and also holds, as we contend, that the right of the citizen to the use of the mails is a property right, and that the letter or package which is put into the United States post-office, duly sealed, becomes the property of the citizen. Indeed, it would be idle, in our judgment, to argue that mail matter, when deposited in the post-office, directed to the party, was not his property and a property right. There is certainly in this case and under these facts a seizure of the mail, because instead of delivering it to the complainants it is returned by the defendant, the postmaster, to the dead letter office there to be opened and destroyed or otherwise disposed of as the post-office department might order. And these letters deposited in the post-office and retained in the postmaster's office at Chicago, Illinois, contained money, drafts, checks, as well as written information and these certainly were the property of the complainants and certainly constituted such property and property rights as come within the protection of the fifth amendment to the constitution of the United States, which provides that no party shall be deprived of his property without due process of law."

And in the case of *Fairfield Floral Co.* v. *Bradbury*, 87 Fed. Rep., 415, Circuit Judge PUTNAM said:

"If I were free to follow my own judgment I should say that Congress neither directly nor through the postmaster general or anyone else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States, at least without a trial. But I am not sure that I will be able to follow my own convictions in this case even though in a final hearing they remain as they now stand. I am not sure that I will not be bound by the decisions of the Court of Appeals in

> the Sixth Circuit, *Association* v. *Zumstein*, 67th Fed. Rep., 1000, when the case comes to a final hearing. My own view is that the decisions of the Court of Appeals in our circuit should ordinarily be followed quite implicitly by the courts in other circuits. The case in the Sixth Circuit does not seem to have been taken to the Supreme Court. I cannot find anything to indicate that it was taken up by writ of error or otherwise and it seems to have been left on the decision of the Court of Appeals so that it stands today the highest judicial authority which we have on the validity of the statute."

Judge Putnam did not refer to the decision of Judge Barr presumably for the reason it was not called to his attention.

The case of *Hoover* v. *McChesney* arose out of a fraud order issued against the mail of the Southern Mutual Investment Company of Lexington, Kentucky; after the announcement of that decision the department revoked the fraud order and that company is still conducting its business which in its underlying principles of depending upon the co-operation of its members in producing growth is the same as that of the appellant; it is no suggestion of weakness that an organization has to be largely dependent upon growth for success; in fact every business enterprise is thus dependent.

I respectfully submit that this court in the case of *C., M. & St. P. Ry.* v. *Minnesota*, 134 U. S., 418, which must of necessity determine this case in favor of my contention found similar acts of a state legislature unconstitutional. That was a case that went up from the Supreme Court of Minnesota. The state legislature had enacted a law to regulate common carriers and creating warehouse and railroad commissioners for that state who

had powers under the act to fix tariffs and charges and could compel common carriers to change their tariffs and adopt such as the commissioners should declare equal and reasonable. Complaint was filed with the commissioners that the railroad company had fixed unreasonable charges and asked the commissioners to change same and adopt rates under the Minnesota Statutes and the commissioners endeavored to have the railroad heed the complaint The company would not yield. Thereupon the commissioners undertook to fix rates and the company refused to comply, whereupon the attorney general applied for a writ of mandamus to compel the company to comply with the rates fixed by the commissioners.

The railroad company replied to the writ by setting up that it was not competent for the legislature to delegate to a commissioner a power fixing rates for transportation, and in so far as it attempted to do so, it was void under the constitution, in that it deprived the company of its property without due process of law in violation of the constitution of the United States. The State Supreme Court decided against the railroad company and the case was taken to this court. This court accepted the State Supreme Court construction of the statute which was in effect that the rates being fixed by the commissioners there was no power in the court to stay the hands of the commissioners or interfere with it, and in a proceeding for mandamus there was no fact to traverse except the violation of the rates fixed by the commissioners.

This court accepting this construction, said:

> "This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that so construed it conflicts with the constitution of the United States in the

particulars complained of by the railroad company. It deprives the company of its right to a general investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and substitutes therefor, as an absolute finality the action of a railroad commission, which in view of the power conceded to it by the state court cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

This court then further said:

"No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare. No opportunity provided for the company to introduce witnesses before the commission; in fact, nothing which has the semblance of due process of law. And although in the present case it appears that prior to the decision of the commission the company appeared before it by its agents and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at."

And again further says:

"If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery it is deprived of the lawful use of its property and thus in substance and in fact of the property itself without due process of law and in violation of the constitution of the United States and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Applying this case to the case at bar what do we find? A postmaster general without any inquiry whatever,

without hearing, trial or notice and "upon evidence satisfactory to himself" and without any course of law being provided whereby he could ascertain whether the evidence upon which he is to act is true or false, he proceeds arbitrarily to interdict and deprive the appellant of any use of the mails and to seize all letters addressed to it or to its officers or agents no matter what the letters contained, be they business, social or friendly or containing valuable property or valuable information concerning property or property interests upon receipt of information contained in the letter it might become necessary for the addresses to act promptly in order to save valuable property.

If these statutes are valid they authorize the branding of all mail fraudulent, whether it is or not and no remedy of any kind is provided by the statutes for inquiry into the fact ever afterwards.

The postmaster general or rather an acting assistant attorney general is made the sole judge in the case.

As the court said in the railroad case so we may say in this:

> "No hearing is provided for, no summons or notice to the complainants before the postmaster general has found what he is to find and declared what he is to declare. No opportunity provided for the complainants to introduce witnesses before the department, in fact nothing which has the semblance of due process of law."

Our contention is further supported by the cases of

United States v. *Rider*, 50 Fed. Rep., 406.

United States v. *Keokuk & H. B. Co.*, 45 Fed. Rep., 178.

The master endeavored to avoid the force of my contention on this point by contending that a letter deposited

in the mail does not become *ipso facto* the property of the addressee.

He argues that

> "the power to determine what is and what is not to be allowed in the mails must be lodged somewhere; otherwise the mails might be filled with dangerous explosives, corrosive acids, vile and obscene literature, matter infected with disease and all sorts of injurious and improper articles."

Congress has enacted that explosives, corrosive acids and such matter and things shall not be received into the mails, and therefore if they are deposited in a post-office unlawfully they are not considered as having been received into the mails. They are not excluded from the mails because they are evil in themselves but because of the danger to the other mail matter.

The explosive, corrosive acids, etc., set forth in the master's report are in themselves non-mailable. A mere inspection of the article itself determines the question of whether or not it is mailable, but letters, registered letters, post-office money orders and other general mail matter addressed to a person or corporation carrying on business, may or may not come within the prohibition of the fraud and lottery sections of the statutes.

No official or employee of the post-office department can tell from the outward appearance of a letter whether or not it contains matter concerning a lottery or contains matter endeavoring to obtain money from the addressee by fraud.

Congress has provided for the punishment of any person or officers of corporations who conduct any business concerning a lottery or endeavor to obtain money through the mails by fraud, by enacting Section 3894 Revised Statutes of the United States, which provides for any

violation of the said section, "a fine of not more than $500, or by imprisonment of not more than one year, or by both such fine and imprisonment for each offense." It also provides they should be "proceeded against by information or indictment and tried and punished either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

If appellant was guilty as charged by the postmaster general, then the effective remedy to punish for past offenses and to prevent future offenses would have been by indictment or information under aforesaid statute; but the officials at that time in charge of the post-office department at Washington did not see fit to proceed under this section, but proceeded under the other two sections already quoted and challenged as being unconstitutional. It is by reason of this unwarranted power and authority granted to the postmaster general, who being too busy himself with other matters delegates his authority to a subordinate, that considerable of the recent post-office scandal has arisen.

In the case at bar, after appellant had gone into a court of equity and filed its bill of complaint in this case and had obtained a rule upon the postmaster, the appellee, to show cause why the injunction should not be issued, and upon the return of the rule and hearing before the master, the witness, Haze Morgan, from Washington and other post-office inspectors appeared in Chicago, took out information against the officers of appellant and had them arrested during the hearing in the master's office. Had appellant through its officers quietly submitted to the fraud order challenged in this case there

would not have been criminal proceedings instituted and then quietly dropped without even a presentment to the grand jury, which was done when said petty officials ascertained that appellant, by its officers, would not withdraw its bill of complaint but was determined to fight for its rights even unto this Honorable court. While this is not in the record in this case, it is of record in the United States Court in the Northern District of Illinois, and arose out of this case, and I cite same to this court for the purpose of showing the statutes which give such arbitrary power to officials as these sections of the statutes do, absolutely contravene the letter and the spirit of the constitution of the United States which was framed for the purpose of protecting the civil and personal liberties of all of its citizens. I might go on and cite numerous other instances of oppression, persecution and ruination of legitimate businesses brought about under these arbitrary sections of the statutes challenged in this case.

Any person, company or concern carrying on its legitimate business and depending principally upon the mails and the use of the post-office establishment of the United States can in a moment by the action of a petty official in the post-office department have its business ruined and be powerless to help itself.

Section 3894 is the criminal statute levelled against the identical abuses of the mails as are provided in Sections 3929 and 4041, and provides ample protection to the post-office establishment to see that the mails do not contain anything therein prohibited. Punishment under the aforesaid sections would prevent any person from continuing any business which was judged by the court after trial to be within the inhibition of the aforesaid statutes.

I wish to further urge that the statutes in question are unconstitutional and void, for the reason that they give the postmaster general, upon evidence satisfactory to him without providing any hearing by or on behalf of the party charged with the violation of said statutes, the right to deprive the citizen of his property and property rights without due process of law, and in this regard I wish to draw the court's attention to the manner in which the department acted in this particular case as well as in the case of the issuing of the fraud order of October 22, 1902, against the mail of the League of Educators, which order was introduced into evidence by counsel for appellee. (Rec., p. 140.)

Before the last mentioned order was issued Mr. Davis, president of the board of managers, attended before the Department at Washington, and there met a Mr. Haze Morgan, the employee of the department, who had made the report upon which the postmaster general had acted in that case, which report Mr. Morgan allowed Mr. Davis to read. After Mr. Davis had read this report submitted by Mr. Morgan to the department, he testified on the trial in this case that he said, "Morgan," and I looked him square in the eye: *"You know that report is false from beginning to end."* Mr. Morgan replied in these words, *"I always show up the blackest side."* (Rec, p. 118.)

Although Mr. Morgan took the witness stand after Mr. Davis had testified, he did not contradict this testimony of Mr. Davis or attempt to do so, so that the department in this instance had acted upon evidence which, while satisfactory to the postmaster general, was false by the admission of the employee of the department, who made the investigation and obtained the evidence upon which the postmaster general had acted.

This record also shows in the case at bar, before the issuing of the fraud order complained of, the postmaster general had acted before he had received the co-operator's agreement, a copy of which is set forth in the bill. Counsel for appellee attempted to show on the trial that the appellee had transmitted to the office of the assistant attorney general of the post-office department a copy of the agreement issued by appellant, and to that end introduced into evidence a letter written by the appellee to the Honorable James N. Tyner, assistant attorney general for the post-office department, which letter was dated at Chicago, on the 10th day of November, 1902, and is stamped as having been received at the post-office department November 12, 1902. (Rec., p. 96.)

It will be observed that the fraud order in question in this case was issued at Washington on November 10, 1902, and was received by the postmaster, the appellee, at Chicago, on November 13, 1902, so that the fraud order in question was issued two days before the appellee's letter, enclosing the co-operator's agreement, had reached the office of the assistant attorney general of the post-office department.

While, as was said by this court in the case of the *American School of Magnetic Healing* v. *McAnnulty, supra:*

> "That the complainants had a hearing before the postmaster general, and that his decision was made after such hearing, cannot affect the case. The allegation in the bill as to the nature of the claim of complainants and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts to show on what basis treatment by complainant rests and what is the nature and character of their business. From

these admitted facts it is obvious that complainant in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not as a matter of law cover the facts herein."

Yet I deem it advisable to draw this court's attention to the arbitrary power placed in the hands of an executive officer of the government by congress, which is and which can be used by the postmaster general and his subordinate in the post-office department to the injury and detriment and to the practical ruination of any citizen's business, whom the said officials may, in their arbitrary discretion, see fit to destroy.

I make the further point that the aforesaid statutes and proceedings authorized thereunder are void and unconstitutional for the reason that they are unreasonable and incapable of enforcement even if constitutional, for the reason that no means is provided by which the post-office department can determine fraudulent from honest mail, and if constitutional in part it can only be enforced by tying up the honest mail in order to reach and be effective upon fraudulent or dishonest mail, and for that reason must be held void.

I do not think this proposition can be successfully controverted. Looking at these statutes it will be seen that the effect of them is to allow the postmaster general or his assistants, whenever they may desire to do so, to condemn mail of all character and to order all mail matter addressed to the citizen about to be deprived of the post-office establishment, to be returned or sent to the Dead Letter Office.

Upon the face of the statutes this situation is absurd, because they provide that nothing contained in them shall authorize the postmaster to open any letter ad-

dressed to said citizen. Now, how is it possible, under such sweeping provisions as these, to do justice to anybody? While the statutes appear to authorize the postmaster general to stop all fraudulent matter and order it returned branded fraudulent, yet the statute upon its face clearly shows that he could have no way of knowing, because it recognizes the fact that he must not open the mails, and therefore they made a sweeping provision which will allow the postmaster general on any evidence, whether true or false, and which he might desire to act upon, to make any order which would in effect and must necessarily, in effect, tie up all the mail of the party. As the postmaster general has no means whatever of knowing whether the mail that he interdicts is or is not fraudulent, and he is not afforded by the statutes any means of inquiry, and the statute recognizes that he cannot open the mail, and as it does not afford any remedy or means for doing it, I contend that the statute must be held void.

It is a well settled proposition of law that where a statute is unconstitutional in part, in order that it may be upheld as to the parts that are constitutional, that which is unconstitutional must be capable of intelligent separation and enforcement, so that it may be operated by itself.

Baldwin v. *Franks*, 120 U. S., 678.

Suth. Stat. Constr., Sections 170-171-173.

U. S. v. *K. & H. Bridge Co.*, 45 Fed., page 184.

I make the further point that section 4 of the act above cited, approved March 2, 1895, which reads as follows: Sec. 4. "That the powers conferred on the postmaster general by the statutes of 1890, Chap. 908, Sec. 2, are hereby extended and made applicable to all letters or other matter sent by mail," is also in violation of the 4th and 5th amendments and of section 8 of article 1 of the U. S. Constitution.

It will be seen that under the provisions of this section the postmaster general has been given authority, upon evidence satisfactory to himself, to stop any person's letter or mail regardless of its character. The section does not even require that the mail should be fraudulent or that any scheme or fraudulent purpose shall be resorted to in order to authorize the postmaster general to stop it. It simply says that the same *power* that he has to stop any mail relating to any scheme or fraudulent purpose, he shall have under this section to stop all *mail of any character.*

It surely will not be contended by counsel for appellee that this provision should be constitutional, for the reason that this section does not say nor confine the postmaster to stopping letters or mail that contain improper matter, but simply authorizes him to exercise the *same power* towards honest mail that he is authorized to exercise by Sections 3929 and 4041 as to *improper mail.* This cannot be sustained under any circumstances, even if this court should hold that Sections 3929 and 4041 were constitutional, so far as giving the postmaster general the right to interfere with and stop *improper mail.* It could not be said that congress has the right to delegate to him the right to stop mail whenever he wants to; that is conceded to be perfectly innocent. This sec-

tion does not even imply that the letters or other matter sent by mail is to be fraudulent before it can be stopped, but it in effect says that as to honest letters the postmaster general shall have the *same power* as he has under the other section to stop *dishonest matter*. This is the only effect and reading to be given to the section.

We respectfully urge that there is no theory or hypothesis upon which this statute can be held not to violate the constitutional provisions heretofore mentioned and the authorities heretofore cited and we again refer to these citations as applicable under this proposition.

The statutes in question are not levelled against anything but registered letters, post-office money orders and ordinary mail matter which when deposited in the post-office could not in any manner injure or effect the mail matter of other citizens.

These statutes are against persons who have and are using the mails. The mails must have been used before the statutes can in any way become operative and the question to be decided in each case specified in the statutes is absolutely a legal and a judicial one, and not such a question as any employee could decide in the case of explosives or other dangerous articles which might destroy other mail matter and concerning which the Congress has said *shall not be received into the mails.*

It is true in regard to lotteries and fraudulent enterprises that the power must be lodged somewhere to prevent the mails being used for their purposes, but it should be lodged in a judicial tribunal. If these statutes are constitutional congress could as consistently and as lawfully give the postmaster general the right to punish by fine or imprisonment any person whom he should adjudge to be guilty of a violation of these statutes.

We therefore respectfully submit that the court should adjudge and declare these statutes unconstitutional and void.

II.

I make the further point that appellant was not, at the time of the issuing of the fraud order in question, engaged "in conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises." This fact was found by the court below in favor of appellant, and no exception was taken thereto by appellee; therefore the postmaster general in issuing the fraud order acted outside of his authority under these statutes.

The order issued by the postmaster general against the appellant's mail was issued because Mr. Christiancy as acting assistant attorney general for the post-office department had concluded that said appellant had violated the fraud part of said statutes, and not because it had violated the lottery provisions.

These statutes provide for two separate and distinct charges, viz.: 1, Conducting a lottery; 2, obtaining money by fraud. A lottery may be operated purely and simply as a lottery, and as a lottery may be fairly and honestly conducted, but it would not impinge on the fraud provision. Again, a person may be guilty of obtaining money through the mails by means of false and fraudulent pretenses or promises and not have any element of lottery in his manner or mode of doing business.

While appellant has been adjudged by the post-office department of being guilty of obtaining money through

the mails by fraud, yet the master after a full hearing decided that the post-office department was wrong and that appellant is not guilty as charged against it, which finding was confirmed by the court below.

Paragraph nine of the master's finding is as follows:

> "The master is of the opinion, from the evidence, that the public clearing house, through its officers, Davis and Baxman, and its predecessor, the board of managers, consisting of the same persons, have dealt fairly and honestly in respect to the collection and distribution of the funds collected by them, and further that they have not been guilty of making false or fraudulent misrepresentations in order to induce persons to become members of the league, but that full opportunity has been given for all persons to become fully conversant with the details and workings of the league's system."

As to the plan or scheme itself, in the master's opinion it may be characterized as *malum prohibitum* rather than as *malum in se."*

The obtaining of money by fraud is *malum in se,* while the conducting of a lottery is only *malum prohibitum.* Lotteries were at one time authorized by congress, and were taxed for the purposes of revenue.

Stone v. *Mississippi,* 101 U. S., 818.

U. S. v. *Olney,* 1 Abb. (U. S.), 278 Fed. cases, No. 15918.

Again, the master says in his report, which was confirmed by the court:

> "It is strongly argued on the part of the complainant that the scheme is innocuous and not fraudulent and not a plan to secure money by means of false or fraudulent representations, and it is pointed out and strongly emphasized that the literature of the league does not promise any definite amount or ratio of profit to its members; *but while this may operate to remove one ground of objec-*

> *tion,* it merely emphasizes the lottery feature of the plan."

Showing conclusively that the master was of opinion and found from the evidence that whatever else may be said about the appellant's business it was not guilty of obtaining money by means of false or fraudulent pretenses or promises.

And the court in a short oral statement at the close of the arguments on the exceptions to the master's report before him, stated in substance that the appellant, by its officers, was not guilty of fraud or of making false pretenses, which clearly shows that both the master and the court were of the opinion that appellant was not guilty as charged in the fraud order issued by the postmaster general at the instance of G. A. F. Christiancy, acting assistant attorney general for the post-office department.

I therefore respectfully submit that the appellant is entitled to an injunction as prayed for in the bill of complaint, for the reasons set forth by the Supreme Court in the McAnnulty case, where the court says:

> "The result is that the postmaster general has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the postmaster general the facts stated must in some aspect be sufficient to permit him under the statutes to make the order."

Again the court says:

> "Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the postmaster general might think to be false opinions, *but only cases of actual fraud in fact,* in regard to which opinion formed no basis."

Ever since the beginning of time every new movement, idea, theory or matter of science has been vigorously attacked by those who do not stop to investigate before they give their opinion that the subject-matter is not feasible and cannot be accomplished. When the telegraph and cables were invented men supposed to be wise in this world's wisdom rose up in the height of their oratory and denounced the inventor in no uncertain terms.

When an eminent mathematician and philosopher endeavored as far as possible to solve the problem of the finance of life insurance he was accused of endeavoring to put upon the public a lottery and a game of chance and to carry on a scheme which was alike immoral and illegal; but life insurance, both old line and fraternal are not only thoroughly recognized now as feasible, but have the protection of the law and the courts.

It is recognized by statisticians, actuaries and authorities in that behalf that not more than 20 per cent. of our population belong to the insurable class and of that 20 per cent. perhaps not more than one-half are able or disposed to take out insurance policies; yet to-day we find a very large number of old line and mutual life insurance companies advertise the great increase in their business of the preceding year for the sole purpose of getting more business and showing to the public their financial responsibility. Fraternal life insurance associations point with pride to the increased number of members obtained by them during the preceding year.

If we examine into the theory of life insurance we find that all life insurance absolutely depends upon getting new business. Every policy issued by a life insurance company at once becomes a liability or is supposed to

become a liability, but as a matter of fact a very large percentage of the policies issued lapse before the insured dies and thereby do not become a claim upon the company.

The source of revenue of a life insurance company are first receipts from premiums; second, profits resulting from what are called lapses. Insurance premiums paid into the company are apportioned by the company into three classes: First, to pay expenses; second, to provide for a mortality fund, and, third, the reserve fund. The expense fund varies from 25 to 35 per cent.; the mortality fund about 30 per cent. and the balance goes into a reserve fund to be invested by the insurance company for the purpose of paying the amount of the policy should the insured live the allotted number of years as fixed by the mortality tables.

The only source from which life insurance companies can look to pay for their death losses is the premiums arising from new business or the increase in membership and the profits from lapses. The amount paid into the reserve fund by the holder of the policy which has by the death of the insured become a claim on the company; while it is popularly supposed that a life insurance company can draw on its reserve fund to pay a death claim, such is not the case; take for example a person taking out a policy of insurance for $5,000 at the age of 35; his premium would be about $144 per annum, which he pays when he takes out the policy, and suppose that he dies during the first year the policy is in force, his estate has a claim on the company for $5,000; he has only paid $144—the reserve fund has probably received 40 per cent., or $57 from him; the difference, $4,943, will have to be paid by the company out of premiums received on new business and lapses. The company cannot touch the

reserve fund to pay this claim except to the extent which the insured has paid into that fund.

That the foregoing is true is shown by the following statements of actuaries:

> "The reserve can be used for no purpose whatever while the original policy is in force except for accumulation." (Mervin Tabor, actuary.)
>
> "No part of the reserve can be used to pay a death claim on any policy, save the one to which it belongs, any more than a bank of deposit can use the funds of one depositor to make good its losses to any other." (E. D. Williams, consulting actuary.)
>
> "The fact is, the reserve is simply and purely a bank deposit, belonging for life or death to the depositor, and having no more real connection with the insurance risk than a corresponding deposit in a bank across the street would have." (Emory McClintock, F. I. A., actuary, Mutual Life, N. Y.)
>
> "THE SAFETY of an insurance office consists in the number of lives it has assured, and the greater the number of transactions it has, the safer it is." (Late Morris A. Black, F. I. A., and actuary.)

In fraternal life insurance the association agrees to pay to the beneficiary of the deceased member a sum certain upon his death for the payment of a small assessment to be made by him from month to month. When a member dies his policy becomes a claim upon the association and is liquidated by an assessment upon all his brother members so that the only source of revenue which a fraternal insurance association has for the payment of its death losses is the monthly dues or assessments of the members.

When the system of insurance was first commenced the wiseacres at once set up the cry that it could not be done and yet insurance is now carried on all over the world on a larger scale than was ever contemplated even by the most sanguine insurance man at the time of the commencement of the system of life insurance.

The same was said in regard to fraternal life insurance and so it has been with every new theory or idea.

For some reason best known to themselves it got into the mind of some of the employees of the post-office department at Washington that the plan and system of co-operation as applied by the league of equity, clearing through the public clearing house and its predecessors, could not be accomplished (or finance out), although the system of co-operation then in force, and which had a membership of about 10,000, had been in operation for a period of over four years and had been successful in every detail and had demonstrated to the satisfaction of its membership that it was on a sound financial basis and was more capable of financing out than either the old line life insurance companies or the fraternal insurance companies (see Record, bottom 57), or any similar organization for the reason that in order to be successful, both old line and fraternal insurance companies or associations must continue to get new members or new business at a sufficient rate to meet their liabilities and to pay their death losses. As an illustration: supposing an increase of 8 for 1 in five years is necessary in order to meet their liabilities and pay their death losses; if for any reason they do not maintain this ratio of increase, they cannot meet their liabilities; whereas in the League of Equity it is immaterial what the increase is for the reason that its plan and system of operation is automatic and will adjust itself to any increase, as will be seen by the causation and realization table set forth in the co-operator's agreement. (Rec., p. 96.)

The principal difference in co-operation (because they are all co-operative) between the insurance companies and associations and the League of Equity is they agree to pay a specific sum upon the happening of the death

of the insured, providing he continues to pay his premiums, whereas in the League of Equity all of the members promise each other that they will contribute their monthly payment of $1 and will realize the amount which will be ascertained by the growth of the organization during their period of co-operation. The league has for its assets the promise of all of its members that they will pay to the realizing members their $1 per month during the period of five years.

While I have shown that only about 10 per cent. of the population are insured, and the insurance companies prosper and continue to grow (Rec., 154-155), yet the League of Equity has for its field to draw from for increase of its membership the entire population as neither climate, health, age, occupation or other disabilities looked into by the insurance companies stand as a bar to any individual man, woman or child from becoming a member of the league and reaping its benefits. It also has the advantage that the member does not have to die in order to reap its benefits but receives the benefit of his work and service and assistance which is given to his fellow-man during this life.

The various kinds and forms of life insurance policies now issued by the various insurance companies throughout the United States and Canada are today as different as daylight is from darkness comparing them with the policies issued fifty years ago, but the same underlying principle of life insurance is the same today as it was when the first policy was written. So it is with every idea; it grows and as it grows, while the principle itself does not change, the details of the plan are changed from time to time. So it has been with the co-operative plan of the League of Equity (Rec., 69); the same under-

lying principle was in force in the league's plan at the time of the issuing of the fraud order as it was when the organization first started, but the plan, with the consent of the members, was in detail changed for the betterment of the members from time to time, until the members of the League of Equity were carrying on their system of co-operation as was set forth in the bill of complaint and the co-operator's agreement.

I wish to impress upon the court that during the entire period of four years from the inception of the principle of co-operation as advocated by the appellant and the members of the League of Equity, there never has been any complaint of fraud, misrepresentations or breach of trust by any of its officers, and that in no place in the record is it shown that any complaint of any kind was ever made against the appellant or any of its predecessors to the post-office department; but it is in the record by the only witness put on the stand by the appellee, an employee of the department who seemingly had charge of and was instrumental in the issuing of the fraud order complained of, that he was not acquainted with any of the members of the league. (Rec., 143.)

Not only there was no complaint made by any of the members of the league that the appellant, its officers, agents or its predecessors had practiced any deceit, fraud or misrepresentations upon them, but they were all willing and anxious and desirous that their letters, which contained remittances, should be delivered promptly by the appellee, as the postmaster of Chicago, to the appellant.

I further wish to impress upon the court that the members of the League of Equity and its predecessors were not illiterate and ignorant members of the community, but were men and women in all walks of life, including

professors in educational institutions, insurance men, doctors, lawyers, merchants, manufacturers, etc. (Rec., 126.)

Not only did the master and the court find that appellant, through its officers and agents were not guilty of obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, but the record fully justifies the findings of the master and the court. In the testimony of Mr. Davis it was shown that a uniform letter was sent out in answer to all inquiries made relative to the business of the League of Educators and also to the League of Equity and the public clearing house, a copy of which letter was introduced in the evidence and is as follows:

"September 24, 1901.

Mr. John Smith, Chicago, Ill.

DEAR SIR: Your inquiry is at hand and you will find literature herewith which if carefully read will give you a good understanding of the value of purely mutual co-operation, or what people can accomplish by co-operating with one another in a purely mutual way.

":Your application and support are not desired until you thoroughly understand the plan, so if there is anything not clear to you, will be pleased to have you call for interview, or will answer any questions by mail.

"Fraternally yours,

"_____."

(Rec., 120-121.)

Also the following extract from the Vigilant, introduced in evidence by the defendant: "No member is ever allowed to join with his eyes closed; every detail of the league's plan and its actual working is an open book to all." (Rec., 153.)

Again in Exhibit N attached to the defendant's an-

swer and admitted in evidence, which is a uniform agreement with all the general managers in their specific territory:

> "Eighth. The said J. N. McCormick agrees to faithfully and honestly represent the said league in said territory and to properly and correctly present the league's plan of co-operation and not to make any misrepresentations of the said league or its work under any circumstances." (Rec., 99.)

The same thought and idea of correctly, honestly, fairly and impartially presenting the league's plan and system of co-operation to all persons making inquiry or to prospective members is contained throughout all of the literature ever issued by the appellant or any of its predecessors. The appellant, by its officers and agents have always been very careful and particular not to make any misrepresentations of any kind whatsoever. They absolutely refused the support of any person who did not thoroughly understand the league and its plan. With this testimony, evidence and literature before the master and the court, notwithstanding the strenuous efforts made on behalf of the defendant by Mr. Haze Morgan, an employee in the post-office department at Washington, a star witness for the appellee on the hearing, and who had claimed to have made an examination into the league's plan, and, under oath, claimed that appellant, its officers and agents and predecessors have been guilty of fraud, misrepresentations, the master and the court found that appellant had not been guilty of obtaining money through the mails by means of false or fraudulent pretenses, representations or promises of any kind. So strong was the testimony, the evidence and the printed literature introduced in evidence upon this point that counsel for the defendant did

not think it wise to take an objection or exception to the master's and the court's findings.

The master having found in his report from the evidence that the appellant by its officers and agents, Davis and Baxman and its predecessor, the board of managers, consisting of the same persons were not guilty of obtaining money through the mails by means of false and fraudulent representations or promises, and no objections to his said findings have been taken by the appellee, his said findings are conclusive of this question and absolutely dispose of the charge made against the appellant under this provision of the statutes in question, and the fraud order issued against it on this ground was therefore improperly and unlawfully issued and the injunction prayed for should therefore be granted in any event.

We now come to the other provision in the statute, viz.: the lottery phase of the statute.

III.

I make the point that even if these statutes are constitutional, yet the appellant corporation, from the facts as proven at the trial, and found by the court, is not, as a matter of law, engaged "in conducting any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind" within the meaning of said statutes, and the postmaster general having assumed and exercised jurisdiction in a case not covered by said statutes, and having acted outside of the scope of the said statutes, the injunction prayed for should have been granted in any event.

The statute is as above quoted.

It will be observed by the court that the statutes herein

above set forth provide for two separate and distinct offenses and gives the postmaster general authority, upon evidence satisfactory to him, to prohibit postmasters throughout the United States from delivering to citizens mail addressed to them, for either one of two reasons or both. The first part of the statute is levelled against persons, concerns or corporations engaged in "conducting any lottery, gift enterprise or scheme for the distribution of money, etc., by *lot, chance or drawing of any kind.*" The second provision of the statute is levelled against persons, concerns or corporations engaged in "conducting any scheme or device for obtaining money or property *through the mails by means of false or fraudulent pretenses, representations or promises.*"

There are also two forms of orders issued by the postmaster general to postmasters under the provisions of the aforesaid statutes; one is known as the lottery order, wherein the postmaster general recites: "It having been made to appear to the postmaster general, upon evidence satisfactory to him that ———— at ———— is engaged in conducting a scheme or device for the distribution of ———— by lot, chance or drawing through the mails, in violation of the act of Congress, etc."

The order complained of in the case at bar was not issued because the postmaster general found that the appellant was engaged in a lottery scheme, but because he found that the appellant was engaged in obtaining money through the mails by means of false and fraudulent pretenses, representations, promises, etc. In fact, Mr. Christiancy, who was at that time acting assistant attorney general for the post-office department, and the law officer of the government who passed upon appellant's plan, and the only one who did pass upon it, as the

postmaster general left the matter entirely to him had said in discussing the matter with Mr. Davis, that there was not any element of lottery or chance in the plan and system of co-operation. This fact was alleged in the bill of complaint (Rec., 12), and was denied in the answer, and an issue was made on it and on the trial the appellant offered to prove the said allegation of said bill; this testimony was objected to by counsel for appellee, and the master ruled it out (Rec., 127), to which ruling objections were filed and exceptions taken before the court so that it is clear both from the wording of the order complained of and the evidence offered to show that the officials at Washington in the post-office department, did not hold or intend to hold in their arbitrary discretion that the plan or system of the league came within the lottery prohibition of the statute for they were satisfied that there was not any element of lottery in the league's plan.

It is alleged and claimed by appellant in its bill of complaint that it is not engaged in either of the acts forbidden by the said statutes, but that its business is legitimate, and therefore it is entitled to the uninterrupted use of the United States mail.

The appellant, the public clearing house, besides the other business authorized by its charter, acts as agent and clearing house for the members of a purely mutual voluntary society, known as the League of Equity. It makes no promises to co-operators in this society, other than to act as agent and clearing house for them, and the master has found that it "has dealt fairly and honestly in this respect."

Paragraph nine of his report.

The master set forth in his report a fairly accurate de-

scription of the League of Equity's plan or system of purely mutual co-operation. It is as follows:

> 6. "The plan or scheme of the League of Equity as set forth in the co-operator's agreement and in other literature issued by said complainant may be briefly stated as follows: Each person who becomes a member or co-operator pays three dollars as enrollment fee and agrees to pay the sum of one dollar per month for sixty months, or five years, and also agrees to 'co-operate' by inducing other persons to become members or co-operators. The agreement states that in consideration of said enrollment fee 'and the faithful compliance with the terms of this agreement hereinafter contained, the above named person shall receive his pro-rata share of the total amount realized (less ten per cent.) when entitled to a realization, as hereinafter provided, said realization to be in accordance with the following ordinary causation and realization table.' Then follows a table showing that if the league grows at the rate of fifteen to one the total realization of the member at the end of five years will be at the same rate of increase, that is, he will receive nine hundred dollars for his sixty dollars paid in; if the growth is at the rate of ten to one he will receive six hundred dollars at the end of five years, and so forth and so on, down to a growth of only one to one, in which case he will receive only his money back, less the ten per cent., which is in each case deducted as the compensation of the complainant for its services and existence as fiscal agent, and less also the three dollars enrollment fee. Aside from this ten per cent., and the three dollars enrollment fee, the plan does not contemplate that complainant shall retain any of the money paid in by co-operators, or that any reserve fund shall be accumulated or invested, but that the money paid in each month shall be as regularly paid out each month (less ten per cent.), to the so-called realizing co-operators, *i. e.*, those whose five year period has expired and who have continued to make the requisite monthly payments during said five years.

There is an additional provision that each co-operator who shall have secured three new members in any one year may realize or receive at the end of each year one-fifth of the amount which he would be entitled to receive at the end of five years, assuming that the growth for the five years continued at the same rate; but the plan contemplates that in the end the member who secures new members and the one who does not shall receive the same amount.

7. All members who join the League of Equity during the same month constitute a class by themselves and are entitled to realize in all respects precisely the same amount and at the same time, excepting the member who obtains new co-operators may receive his realization in yearly installments, instead of in one lump at the end of the five year period.

The only source of income to the league and the only funds to which its members can look for payment of the promised amount or any amount whatever, is the fund created each month by the payment of monthly dues, and the realization of any amount whatever by new members is conditioned absolutely upon the constant acquisition of other new members, and the new payments to be made by such new members. *And what amount the members or co-operators will realize, as is stated by the league literature, depends entirely upon the ratio of growth of the league.* No reserve fund is accumulated and no investments whatever are made of any portion of the money paid in by members."

From this statement of the plan or system the master concludes that the appellant in acting as agent and clearing house for the co-operators of this society is guilty of engaging in a lottery, &c, described in the statute.

The court will observe from reading the statute that congress has coupled the words lottery, gift enterprise and chance, lot and drawing of any kind, together, so

that they are all synonomous one with the other, and all are used as having one general meaning, viz.: Lottery as that word is usually understood. The master in coming to his conclusion that the plan and system of the League of Equity is within the inhibition of the statutes above quoted uses the words that the plan is "in effect a lottery" and "that the scheme is as utterly a gambling one, as utterly dependent upon chance, as the question whether the roulette ball will fall on the 'red' or 'black' or on any specific number, and thus pay the gambler little or much or nothing according to his luck," showing that the master has characterized the plan, which is as he has set it out as above, is nothing more nor less than a lottery.

The question then is: What is a lottery? This has been defined by the standard dictionaries as

> "A scheme for the distribution of prizes by chance, or the distribution itself." Webster's Encyclopedic Dict.
>
> "A lottery has been defined as a scheme for the distribution of prizes by lot or chance."

Bouvier's Law Dict.:

> "A lottery *depends absolutely upon chance.* A lottery is a scheme by which a result is reached by some action or means taken and in which *man's choice or will* has no part, nor can human reason, foresight, sagacity or design enable him to know or determine such result until the same has been accomplished."
>
> *People* v. *Elliott,* 74 Mich., 264-16 Am. St. Rep., 640.

> "A lottery is a sort of gaming contract by which for a valuable consideration one may by favor of the lot obtain a prize of a valuable, superior to the amount of value of that which he risks.
>
> Ex. P. Kameta, 36 Oregon, 257.

"Where a pecuniary consideration is paid and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it or whether he is to have anything, it is a lottery."

Chief Justice Perley, in case of *State* v. *Clark*, 23 N. H., 335-66, Am. Dec., 763. This definition is quoted with approval by U. S. Circuit Court of Appeals for 7th Circuit in *McDonald* v. *U. S.*, 63 Fed. Rep., 426, affirming 59 Fed. Rep., 565.

See also,

Lynch v. *Rosenthal*, 144 Ind., 90.
Horner v. *U. S.*, 147 U. S., 458.
U. S. v. *Wallis*, 58 Fed. Rep., 942.

"A lottery is a gambling contract in which one or more parties on the one side risk a small sum for the chance of obtaining a greater, *the winner or winners to be determined by lot.*"

Am. & Eng. Enc. of Law, Vol. 14, p. 600, 2nd Ed.

What is lottery? The answer to this question must be found in the meaning of the word as established by usage and authority. I assume that the argument of appellee will be that the legal and popular meaning of the term coincides, and that it is used in the statute according to its ordinary and general acceptation. Indeed I am not aware that the word has any technical or peculiar significance. The word "Lottery" is defined and used as follows by lexicographers and writers:

"A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or articles." Worcest. Dict.

"A disposition of prizes by lot or chance." Webster Dict.

"A scheme for the distribution of prizes by lot or chance." Bouvier Dict.

"A kind of game of hazard, wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate." Rees' Encyclopedia.

"A sort of gaming contract by which for a valuable consideration one may by the favor of the lot obtain a prize of a valuable superior to the amount or value of that which he risks." Am. Cyclopedia.

"That the chance of gain is naturally over-valued we may learn from the universal success of lotteries."

Smith, Wealth Nat. Bk., 1 C., 10.

All these authorities agree that where there is a distribution of prizes, something valuable, by lot or chance that this constitutes a lottery. But the definitions from Worcester and the American Cyclopaedia are the most complete. From each of these it expressly appears that a valuable consideration must be given for a chance to draw a prize.

U. S. v. *Olney,* 1 Abb. (U. S.), 278 Fed. Cases, No. 15918.

Sec. 180, of Criminal Code of Illinois, Hurd's, Stat. of 1899, make it a criminal offense to engage in a lottery in this state, and the legislature has given the word a very broad and general meaning. The Supreme Court of this State in construing that statute says:

"Under the statute of this state a lottery scheme to come within its prohibition must contemplate the distribution of prizes by chance and there must be a chance to gain or lose something by the drawing."

Dunn v. *People,* 40 Ills., 465.

Thomas v. *People,* 59 Ills., 160.

Elder v. *Chapman,* 176 Ills., 142, at p. 150.

"Every lottery has the characteristics of a wager or bet although every wager is not a lottery."

Wilkinson v. *Gill,* 74 N. Y., 67-30, Am. Rep., 264.

What is chance? It is defined by lexicographers as:

"To happen, to fall out, to come or arrive without design or expectation."

"An event that happens, falls out, or takes place without being contrived, intended, expected or foreseen, the effect of an unknown cause, or the unusual or unexpected effect of a known cause, accident, casualty, fortuitous event, as time or chance happen to all."

Webster's Encyclopedic Dictionary.

It will be seen from above definitions, decisions of courts and judicial interpretations of the words lottery and chance that every lottery must have an element which is an essential part of the scheme or plan which is determined by something over which man has no control and over which *his "will"* plays no part. The plan of the League of Equity as described by the master shows that there is not a single element of lottery or chance in it when tested by any of the above definitions or quotations or decisions.

Judge Grosscup had this question of lottery before him in the case of *U. S.* v. *MacDonald,* 59 Fed. Rep., 563; in that case the court said:

"What is lottery? The best definition I can find for it is this: Where a pecuniary consideration is paid and it is determined by chance or lot, according to a scheme held out to the public, whether he, who pays the money is to have anything for it, and if so, how much? That is a lottery. You will see therefore that the elements of this definition are two: First, that the party who pays the pecuniary

consideration must have a return—a prize; second, that return or prize is determined by lot or chance."

MacDonald v. *U. S.*, 59 Fed., 563.

Again the court in the same case said:

"Take for instance life insurance companies—those that proceed either on the stock plan or on the assessment plan; they require of the member that he pay a certain amount of money; that is the pecuniary consideration. That money is invested or supposed to be invested in securities and when the member dies a certain amount, stipulated in the policy, is paid to his heirs or the beneficiary named in the policy. That is the return. The man may have been insured but a month and have paid in but a few dollars, and have received back $5,000 or $10,000. In such instances as that a much larger sum has been returned than the consideration, but the fact that there was such a return does not make it an unlawful enterprise. Why? Because the prize is not determinable upon lot or hcance. It is dependent upon the life of a man, and the life of a man is determined by the laws of nature and not by the chances of lot."

And right here I desire to call the attention of this Honorable Court to the fact that the five year period of co-operation in the plan of the League of Equity is more certain than the life of man, because the length of man's life is indefinite, whereas the period of five years in the league's plan is definite.

"A man who makes an investment in real estate may put in a few thousand dollars and take out a million. What he puts in is the consideration; what he takes out is the prize. It may be a hundred fold larger than what he puts in, but on what is it dependent? Upon the growth of public sentiment respecting the value of property in that particular locality; upon the law of growth, which is itself a natural one—an industrial law."

The master in his report states that the only difference between this and an

> "ordinary lottery is that in the ordinary lottery the amount of the prizes is fixed in advance and the prize drawers are determined by lot, whereas in this plan the prize drawers are determined in advance and the *amount of the prizes are settled by lot or chance.*"

In other words, the master finds that everything in the league's plan is certain, specific and determined with the exception of the amount which the realizing co-operator is to receive, and as above quoted, he says, "that is determined by 'lot or chance;'" and right here is where the master has fallen into error. He states in describing the league's plan:

> "It invites people to join the said league, and holds out inducements in the shape of a large return for *small amounts of money and for services to be rendered* by members or co-operators in inducing others to become members or co-operators."

Paragraph 5 of master's report.

That is to say, the difference between what a co-operator realizes and that which he contributes is absolutely determined by the amount of service or work he and his fellow co-operators or co-partners have performed, or as stated by the league literature, *depends entirely* upon the *ratio of growth* of the league, and in the words of Judge Grosscup it is a "natural and industrial law."

Surely then it does not depend upon lot or chance in the sense of the lottery acts. The amounts which the co-operator realizes depends entirely upon growth and by his agreement with the rest of the co-operators he agrees to help produce that growth; he has it absolutely within his power and all of the co-operators have it within their power to make their own agreements good and

valuable. It depends on *their own choice,* on *their own will.* If they do not work and render service then there is no growth produced and there is no gain, neither is there any loss, and therefor there is not a single element or vestige of lottery or gambling in the league's plan.

The master argues that it is impossible for the co-operator to know how many he will himself secure. It is *a fortiori* impossible for him to know how many any or all of his fellows will secure and therefore it is uncertain what amount he will realize and that being uncertain and indefinite, therefor the plan is a lottery and the scheme is as much a gambling one as the game of *roulette.*

I wonder if the learned master can foretell how much his earnings will be during this year, or can he forecast it. He can approximate it from the experience of the past. It absolutely depends upon the amount and kind of litigation which may come before him. Over this he has absolutely no control, for it depends upon the litigants and the court whether cases will be referred to him or not, and this is not within his power, so that the amount of his revenue is uncertain, indefinite and dependent entirely upon others (so far as his revenue as master is concerned), and yet it could hardly be said that therefore he is engaged in conducting a lottery.

Take the case of the investment in real estate referred to by Judge Grosscup. There a man may invest in real estate he has never seen, and he may not have done anything towards building up a town or city on or near it, and yet by something over which he has no control, in no manner contributed or assisted by his work or service, nor could he with any degree of certainty foretell or forecast what the increase in value would be, yet by

a growth produced by others he is able to realize many times his investment.

In the league, however, the realization depends upon growth and the growth depends upon the exertions of the co-operators, upon their *willingness* to render service, so that it depends upon themselves absolutely and they have it in their own power and control.

There is no business in this world but what depends more or less upon growth for its success and no man can forecast to a certainty what his profits will be for any given period of months or years. If the league's plan is a lottery then every other business which depends upon the law of growth is a lottery. The law of growth is a natural law. The master says that the league offers a prize and therefore its plan is a lottery. Judge GROSSCUP in the McDonald case, *supra,* says:

> "Now every enterprise in which we engage has a return or prize or is supposed to have. That is the incentive which makes man industrious. Whether that return or prize be determined by mere lot or chance makes it either a legitimate enterprise or a lottery and therefore an unlawful enterprise,"

So that the important question in each case is "Is the essential element in the plan and system determined by lot or chance?" If it is not, so determined then the enterprise is not a lottery and therefore it is not unlawful. The system of purely mutual co-operation as applied by the League of Equity is entirely lacking in this essential element. It is impossible to interpret any of the foregoing decisions so as to include this plan and system within the purview of any of said definitions of a lottery. The essential element to constitute it a lottery is entirely lacking in this proposition. The contingency upon which a co-operator realizes is the securing of one or more new

co-operators or the paying of his monthly share for five years. Neither one of these contingencies is chance for it is entirely within the control of the co-operator whether he procures new co-operators or pays his monthly share and keeps his agreement in force for the period of five years and thus make his agreement valuable.

If this enterprise is a lottery then so is every old line life insurance company engaged in a lottery. Let us suppose a person takes out an endowment policy in any old line life insurance company, for say ten years and lives that time, paying his annual premiums. Can the insurance company tell him at the time when he takes out his policy what amount he will receive for his policy on his investment at the end of the ten years? No. Why? Because it is impossible to tell what will be the profits in that time, or how many will take out insurance and how many will lapse, etc. If you could foretell these contingencies, then you could tell the amount the insured would receive on his endowment policy. So it is in the league. If you can foretell how many will join and be persistent for five years you can tell accurately what the co-operators' realization will be. But that is uncertain in the league the same as in every other human institution. The growth of the league depends upon the natural and unalterable law of increase. So it is with assessment fraternal insurance companies. The number of assessments to be levied in any one year depends upon two contingencies, viz.: The number of deaths and the increase in the membership. No one thinks of calling either old line life insurance companies or assessment insurance companies lotteries. The theories of our laws and constitution are that all citizens are equal before the law and that the law shall be applied equally to all. A law which condemns one man's business must condemn all

persons in a similar business and the law which upholds one citizen's business must uphold all other citizens similarly situated. The law and the courts uphold and declare legal both old line life and assessment insurance companies. The league's plan has no more element of lottery in it than have these companies. If they are lawful then so is the league.

A similar plan was before the court in the case of *Hoover* v. *McChesney, supra,* where the postmaster general issued a "Fraud Order" against the Southern Mutual Investment Company of Lexington, Kentucky, on the ground that it was engaged in the conduct of a lottery or similar enterprise; and the court granted an injunction against the postmaster and shortly after the order of the postmaster general was revoked and they are continuing to do business today. It is a bond investment company and one of its essential features is that the company will redeem one or more of the coupons attached to the bond after the payment of five monthly premiums out of a total of 72 or 6 years, and the redemption of these coupons as to time depends upon the number of bonds sold and premiums paid by new bondholders. Forty per cent. of the money of the new bondholders is used to redeem the bonds of those who have been bondholders for five months or longer, but whether a coupon is redeemed in the fifth, sixth or seventh or later month depends upon whether or not the coupon fund is sufficient to pay all coupons similarly situated. If it is not sufficient then the coupon holders must wait until such time as that fund is increased by new business and this depends upon the number of new bondholders contributing to the coupon fund. This company makes an absolute promise to pay on the forty-five coupons attached to each bond $1.50 for each dollar invested, plus

5 per cent. interest on the amount paid in on the redeemed coupon for the average time of the investment according to the table of values on the bond which varies each month according to the month in which the coupon happens to be redeemed. Here the time of redemption and hence the amount realized on a special coupon attached to a bond depends solely and entirely upon the number of new bondholders obtained by the company after any specified bond has been issued. This is the plan of that company which has been endorsed by the courts, the post-office department, and authorized to do business in all the States of the Union. No court or state official has ever declared the business of this company a lottery because the redemption of its coupons depend as to time and amount upon its own exertions in securing new bondholders and it must be borne in mind that the post-office department have not declared that the League of Equity and public clearing house are engaged in a lottery. The master has so found in this case and yet in the league's plan the amount which a co-operator will realize does not depend upon the complainant company or on any one else except the co-operators themselves. Then I ask when on this phase of the case it is entirely within the control of the co-operators themselves whether they will realize much or little, can it be said that the complainant company and the co-operators in the League of Equity who consist of the very best people in this country are engaged in the conduct of a lottery or similar enterprise.

Again in the Southern Mutual Investment Company the forty-five coupons attached to the bond may all be redeemed in fifty months or longer, according to the growth of the business, but the bond itself is to be redeemed at the end of seventy-four months; now the

amount which the bondholder will receive depends solely and entirely upon the advantageous investment by the company of 40 per cent. of the premiums paid by him during that time, plus the lapses of the unfortunate who have fallen by the wayside, excess interest, reserve or redeemed coupons, surrenders, fines and forfeitures. Can any human being foretell what these will amount to in seventy-four months? No; neither can any man or any business tell what the profits will be in a year, let alone six years, yet the courts, state authorities, officials and the public do not think and rightly so, that this company is engaged in a lottery, simply because one cannot tell what the value of the bond will be at its maturity, and this value in a great measure so far as profits are concerned depends principally upon lapses, fines and forfeitures, and so far as interest accretions are concerned it depends upon the skill and judgment of the officers of the company.

The league's plan and system is an equitable distribution among its members of their labor and contributions, and they do not depend on any concern or company, nor on the judgment and skill of anyone, but solely and absolutely upon themselves and each co-operator, and all of them have it within their power to make their agreements good and valuable, and the amount which they receive does not depend upon those who are unfortunate and lapse, or upon fines and forfeitures, but depends solely upon their own efforts and exertions.

The business of appellant and its predecessors has been carried on in the City of Chicago for upwards of four years and they each had in their plan the very same principle and manner of conducting their business as the appellant in regard to which point the master has found constitutes a lottery.

The State of Illinois has upon its statute books laws prohibiting lotteries and similar enterprises and its officers have had the plan of the appellant drawn to their attention and they have not charged it with committing a crime; on the contrary they recognize the business as one to be protected; and this very feature which the master says is a lottery was publicly proclaimed at all times and made a prominent part of their literature. The post-office department was during all those years furnished with copies of the literature as soon as it came from the press, in which this identical feature was given extraordinary prominence, and that department, biased as it is against the appellant, did not deem that there was any element of lottery in the league's plan. It remained for the master to find that because "The league does not promise any definite amount or ratio of profit to its members—it merely emphasizes the lottery feature of the plan." I respectfully submit that here the master has fallen into grave error.

From the decisions of the courts and the definitions of and concerning lotteries above quoted, these statutes cannot be distorted or enlarged in the manner in which the master has endeavored to interpret them. They cannot in any manner be so interpreted without doing violence to the ordinary and usual rules of interpretation.

The master evidently with the intention of supporting his finding that the appellant is engaged in a lottery has inserted in his report the statement "that there is also a certainty that there will be many blanks drawn." This statement by the master is absolutely contrary to the evidence and is not supported by one scintilla of evidence. On the contrary the evidence adduced and the exhibits offered and in evidence absolutely disproves this finding.

It was not even claimed by the appellee's star witness, Morgan, that there were any blanks to be drawn. Again the master's finding and statement of the plan of the league shows conclusively that there are no blanks to be drawn by any of the co-operators. In fact there is no such a thing as a *blank* in the plan. The master failed to point out where in the plan he found that *blanks* were to be drawn. And I challenge the counsel for the appellee to point out to the court if they can, anything in this record to support the said statement or finding of the master.

On the contrary, the master in his first report to the court on the motion for a preliminary injunction in describing the league and its plan used these words,

> "What amount they will realize, as the league literature states, depends upon the ratio of growth of the league; and this ratio of growth depends upon *the individual efforts of the members.*"

The above finding of the master in the first report is not changed or altered in the report made on a full hearing, for the obvious reason that he based this finding upon the literature of the league and that is incapable of being changed. Had it been based upon oral testimony then there might be a possibility of contradictory evidence, but it is impossible to change or contradict the printed evidence of the league's literature; therefore it cannot be gainsaid that there is any element of lottery in this plan or system, because in order to have a lottery the plan must depend solely upon chance; where it depends "upon the individual efforts of the members" it does not in any legal sense of the word depend upon "chance." In other words, "in order to have a lottery, the scheme or plan must produce a result by some action or means taken in which man's choice or will has no part."

People v. *Elliott,* 74 Mich., 264.

When man's choice or will performs the most important part of the plan to determine the result, then there is no lottery.

> "Where skill or judgment is exercised in determining the prize winner, there is no lottery."
>
> *Barclay* v. *Pearson* (1893), 2 Chy., 154.

CONCLUSION.

In concluding I wish to again state and urge that Sections 3929 and 4041 Revised Statutes of the United States, and also Section 4 of an act approved March 2, 1895, are unconstitutional and void for the reason that they are in violation of the Fourth and Fifth Amendments of the Constitution of the United States in that said statutes take away from the citizen his property and property rights without due process of law or the least semblance of due process of law as that phrase has been interpreted time and again by the courts; and the said statutes also permit and allow the seizure of papers and property without warrant or authority, and also because said sections and the proceedings thereunder must be held to be void, because even if constitutional in part it is impossible to enforce any of its provisions against improper mail without tying up honest mailable matter.

I am not contending that Congress may not pass laws prohibiting the improper use of the mails and provide for punishment; or do I contend that Congress may not by proper legislation provide that the postmaster general be authorized to institute proper proceedings summarily upon notice before any court, judge in vacation, or other proper tribunal that Congress may fix upon, which may afford reasonable means for inquiry and which conform to the fundamental idea that the party is entitled to some kind of a notice and hearing before he is condemned, and which will give him full opportunity to present his case to the court or a judge, in order that the question involved may be determined according to legal procedure.

But what I do insist on and strenuously urge is that Congress cannot delegate to the postmaster general or any other person the right, whenever he sees fit, upon such evidence as may be satisfactory to him and of which he is the sole judge and from whose decision there is no appeal, to seize, destroy and interdict admitted proper and innocent sealed mail and packages, checks, drafts and money of any person or company in the United States when it has once been admitted to the mail, without any notice or hearing or any opportunity being provided by law whereby the party charged may have an opportunity to present his side of the case. This is what we are contending for and nothing more so far as this record raises the question of the constitutionality of the statutes challenged.

Irrespective of the constitutional question raised in this record upon the merits, I contend and insist that appellant, in carrying on that part of its business wherein it acts as the clearing house or fiscal agent for the members of the League of Equity, has not been guilty of obtaining money through the mails by means of any false or fraudulent pretenses, representations or promises of any kind, and in this connection I wish shortly to state that the master, and the court confirming his report, have found that appellant was not guilty of any violation of the aforesaid provision of the statutes hereinbefore quoted. (Rec., 106.)

In paragraph 8 of the master's report (Rec., 106) the master endeavors to argue that the league must eventually come to an end and that when it does come to an end for any reason, all those who are members at the time when the supposed end arrives will have lost all the money that they may have paid for the benefit of their fellow members.

It is true that in any business if it is brought to a sudden end it will be a loss to those engaged therein; with all the assets, reserve funds, buildings, government bonds, etc., owned by the various life insurance companies there is not one of them, which if brought to an end but what will cause a great loss to all of their policy holders. In the League of Equity as well as in life insurance, it cannot come to an end except by the action of the members themselves. If they cease to fulfill their agreement by paying their monthly share and also do not endeavor to get other persons to join, they will be elapsed of their own volition as is provided for in Section 3 of the co-operator's agreement (Rec., 96), and so it is with life insurance; if the policy holder fails to pay his premiums when they are due his policy becomes forfeited.

I here again wish to reiterate and state that part of the consideration of entering into the league and reaping its benefits, is the promise on the part of the member to co-operate, *i. e.* get new members and pay his monthly share, and by so doing each member has it within his power, and all of them have it within their power to make their own certificates (*i. e.* co-operator's agreements) good and valuable; and for these reasons, upon this phase of the statute I urge upon the court and insist that appellant is not engaged in conducting a business whereby it receives money through the mails by means of false or fraudulent pretenses, representations or promises. The facts in this case are practically admitted as the printed literature and circulars of appellant and its predecessors in evidence cannot be varied or contradicted, and the explanation of the literature as given by the witnesses on behalf of appellant (Rec., 114-136)

has been accepted as being the true construction by the master, and the testimony given by Mr. Haze Morgan, wherein he endeavored to show that fraud and false pretenses were used by the officers of appellant was not sustained and the master found contrary to his testimony. This case therefore comes within the decision of this court in the case of the *American School of Magnetic Healing* v. *McAnnulty, supra;* wherein the court states:

> "Other instances might be adduced to illustrate that these statutes were not intended to cover any case of what the postmaster general might think false in his opinion, *but only cases of actual fraud in fact,* in regard to which opinions form no basis."

I therefore urge that the court below erred in not granting the relief prayed for in the bill of complaint.

Also in concluding I wish to urge upon the court that the master and the court below erred when they found that appellant was guilty of being engaged in conducting a lottery, so-called gift enterprise or scheme for the distribution of money or of any real or personal property by lot, chance or drawing of any kind.

For the reasons I have above pointed out to the court, it is clear in this record that appellant, in acting as the clearing house and fiscal agent for the members of the League of Equity, is not engaged, in any sense of the word, in conducting a lottery, and for the same reasons neither are the members of the League of Equity engaged in conducting or carrying on a lottery through the medium of appellant. One of the essential elements to constitute any scheme a lottery is that if there are prizes they must be awarded by means of lot or chance. This element is entirely lacking in the plan and system of co-operation as applied by the League of Equity, clearing through the appellant. Even if it is conceded that

there are prizes which are awarded, they are not awarded by chance or lot, but upon the contingency of securing one or more new members or paying his monthly share for a period of five years; that is to say, carrying a co-operator's agreement for a period of five years. Neither one of these contingencies is chance because it is entirely within the control of the member holding the agreement whether he procure new members or responds by paying his monthly share and thus keep his certificate in force for the period of five years.

The statutes in question and the prohibition contained therein are penal in their nature. Section 3894, Revised Statutes, is the section which imposes fine and imprisonment upon persons using the mails for improper purposes; and that statute provides, "no letter, postal card or circular concerning any lottery, so-called gift, concert or similar enterprise offering prizes dependent upon lot or chance or concerning schemes devised for the purpose of obtaining money or property under false pretenses, etc."

It will be observed by the court that the wording of Section 3894 is almost identical with the wording of Sections 3929 and 4041. Could it be successfully contended that if the officers of appellant had been indicted under Section 3894, and the proof placed before the court and the jury was the same as is here presented to this court in this record, would not this court hold, as a matter of law, that the testimony showed conclusively that the prisoner was not engaged in conducting a lottery?

What I contend for, is that in construing the section of the statutes challenged, this court must construe them as strictly as they would construe Section 3894 on a criminal charge; and if appellant has not violated any

law of Congress, and if its business does not come within the prohibition of the aforesaid statutes, then appellant is surely entitled at the hands of this court to its legal right to the use of the mails and post-office establishment of the United States.

There is not any controversy of facts in this record, but upon the admitted facts there is a controversy as to whether or not the appellant's business is within the prohibition of the said statutes. For the reasons hereinbefore fully set forth, I maintain and contend that appellant has not violated any law which Congress has passed, and that as appellant's letters contain checks, drafts, money orders and money itself, all of which was its property as soon as deposited in the various post-offices for transmission by mail, appellant is entitled to the relief prayed for in the bill of complaint; otherwise its business as is alleged, would be irreparably injured and wronged.

I, therefore, respectfully submit and urge upon this court and ask that the judgment of the United States Circuit Court for the Northern District of Illinois, be reversed and said court order to be issued a perpetual injunction restraining and prohibiting the appellee, in his official capacity as postmaster of the City of Chicago, from proceeding further under the so-called fraud order issued by the postmaster general November 10, A. D. 1902, which said fraud order was issued under the sections of the statutes hereinbefore quoted, and that he be ordered to turn over and deliver to appellant with regularity and dispatch all mail matter whih may now be in his possession or which may hereafter come to his pos-

session addressed to appellant, and that he be directed to give to appellant the ordinary use of the registered letter and post-office money order provisions of the post-office establishment of the United States.

Respectfully submitted.

D. I. SICKLESTEEL,
Counsel for Appellant.